

ASTOR'S
EQUITAS RE HANDBOOK

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Of Middle Temple and Lincoln's Inn, Barrister

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The most famous insurance company on earth — Lloyd's of London — has made countless millions of dollars out of the tendency of everybody to worry about things that rarely happen. Lloyd's of London bets people that the disasters they are worrying about will never occur.

Dale Carnegie, *How to Stop Worrying and Start Living*

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Glossary of Abbreviations

*In this Edition, the following terms have the following meanings unless expressly stated or the context otherwise requires. A term in **bold** has its own glossary entry. Terms particularly coined for this book and not generally used elsewhere are underlined. A reference to an instrument is to its version (or relevant replacement) as at the Preface's "as at" date. Relevant instruments often contain their own definitions.*

A

ABI — Association of British Insurers

ABI General Code — *Statement of General Insurance Practice* (**ABI**, January 1986)

ABI Intermediaries Code — *Code of Practice for all Intermediaries (Including Employees of Insurance Companies) other than Registered Insurance Brokers* (**ABI**, November 1988)

ABI Long-term Code — *Statement of Long-Term Insurance Practice* (**ABI**, August 1992)

administrative receivership — Insolvency Act 1986, Part III administrative receivership

Action Group Settlement Agreement — *see* **RRC 3**

APH — asbestos, pollution and health hazard

Asbestos Documentation Requirements I — London Market Insurers' Documentation Requirements For Asbestos Bodily Injury Claims (Pi-688420 V1 0602485-0921), effective June 1, 2001; also known as "DRs" (Equitas Re, 2001). *See* **Inward Reinsurance Documentation Requirements I**

assured-at-Lloyd's — a person insured by a **SYA participant**; excludes, where the context requires, a SYA participant insured by himself or another SYA participant. "Policyholder" is infelicitous: not every assured's-at-Lloyd's insurance contract(s) will be evidenced by a relevant policy

Astor's Law of Lloyd's, 2nd. ed. — includes updates and (where appropriate) subsequent editions

at Lloyd's — actually or notionally at or in connection with the **Lloyd's enterprise** and or the **Corporation**. *Cf.* **Lloyd's**

AUA 9 — Additional Underwriting Agencies (No. 9) Ltd. Incorporated in England and Wales, number 2666937. All 100 £1 ordinary shares are owned by the **Corporation**

AUA 10 — Additional Underwriting Agencies (No. 10) Ltd. Incorporated in England and Wales, number 2666936. All 100 £1 ordinary shares are owned by the **Corporation**

B

back office; back-office — in the context of the **Lloyd's enterprise**, as between the **Member** and relevant components of the Lloyd's enterprise; *cf.* **front office**

byelaw — *see* Byelaw

Byelaw — a byelaw made by the **Council** under Lloyd's Act 1982, s.6(2)

C

CA — Court of Appeal (England)

calendar year — January 1 to December 31

Canadian Combined-Use TD 1999 — the November 9, 1977 deed between *inter alia* Royal Trust Corporation of Canada and the **Corporation** amended March 8, 1978, amended and restated June 11, 1989 and September 26, 1995 and as may be further amended from time to time. *See* **Canadian Combined-Use TF 1999**

Canadian Combined-Use TF 1999 — the funds from time to time held in respect of a relevant SYA participant under the terms of the **Canadian Combined-Use TD 1999**

Captives Guidance Notes 1999 — *Guidance notes for applicants establishing a captive syndicate [and] establishing a captive corporate member, November 1998* (Lloyd's, February 1999)

Captives Guide — “Captives” (Lloyd's, undated)

CAT — catastrophe

Central Fund — as appropriate, the Lloyd's enterprise's **Old Central Fund** and or **New Central Fund**. This Edition is of the view that the Central Fund is not included in the Corporation's personal assets

Central Fund US TD 1 — Lloyd's Central Fund United States Trust Deed, July 17, 1992 as amended and restated September 15, 1995. Usually at Lloyd's “CFUS 1”

Central Fund US TD 2 — Lloyd's Central Fund United States Trust Deed (Number 2), June 14, 1995 as amended and restated September 15, 1995. Usually at Lloyd's “CFUS 2”

Centrewrite — Centrewrite Limited. Incorporated in England and Wales, October 24, 1990, number 2551468; wholly owned by the **Corporation**

Chain of Security 2002 — *Lloyd's chain of security 2002* (the pdf of that name at lloydsoflondon.com, July 15, 2002)

Chain of Security (RA 2001) 2002 — *Security underlying policies issued at Lloyd's at Corporation RA fye December 31, 2001, pp.36-38* (Lloyd's, May 2002)

CIPA — “coverage in place” agreement

Code: Complaints — *Code for Underwriting Agents — UK Personal Lines Claims and Complaints Handling* (Lloyd's, 1997)

Code: Lloyd's Brokers — *Code of Practice for Lloyd's Brokers* (Lloyd's, 1988)

Code: Managing Reserving Risk (managing agencies) — *Code for Managing Agents: Management of Reserving Risk* (Lloyd's, 1998)

Code: Responsibilities — *Code for members' agents: responsibilities to members* (Lloyd's, 1999)

Code: Syndicate Expenses (managing agencies) — *Code of Practice for Underwriting Agents on Syndicate Expenses* (Lloyd's, 2000)

Code: UK Personal Lines — *Code for managing agents: UK personal lines, February 3, 1999* (Lloyd's, 1999)

Code: UK Personal Lines Claims — *Code for Underwriting Agents: UK Personal Lines Claims and Complaints Handling* (Lloyd's, 1997)

Committee — the Lloyd's Act 1982, s.5 Committee of Lloyd's; *see* **Council**; **Old Committee**; **self-regulators-at-Lloyd's**

common-use fund — a claims payment securitisation fund regulatorily required to be maintained in relation to the eligible liabilities of a number of different relevant SYA participants; *cf.* **personal-use fund**. Usually at Lloyd's “joint asset fund”

company voluntary arrangement — an Insolvency Act 1986, Part I company voluntary arrangement

Completion Accounts and Co-operation Agreement — *see* **RRC 9**

Consortium Underwriting 1998 — *Consortium Underwriting 1998* (LPSO, February 1998)

conventional RTC — RTC as ordinarily conducted at Lloyd's. *Cf.* **EquitasRe-RTC**

corporate Member — a **Member** which is incorporated. *Cf.* **natural Member**

Corporate Member Supplement 1998 — *Corporate participation at Lloyd's and Guidance notes for applicant corporate members — A supplement to the 2nd editions* (Lloyd's, July 20, 1998)

Corporate Members Guidance Notes 1997 — *Guidance notes for applicants — corporate member, 2nd ed.* (Lloyd's, April 30, 1997)

Corporate Participation 1997 — *Corporate Participation at Lloyd's 2nd ed.* (Lloyd's, April 30, 1997)

Corporation — the corporation created by Lloyd's Act 1871, s.3; **Lloyd's** properly so called

Council — the Lloyd's Act 1982, s.3(1) Council of Lloyd's. *See* **Committee**; **Old Committee**; **self-regulators-at-Lloyd's**

CP 16 — *FSA Consultation Paper 16: The Future Regulation of Lloyd's* (FSA, November 1998)

CP 48 — *FSA Consultation Paper 48: The Lloyd's Sourcebook* (FSA, May 2000)

CP 66 — *FSA Consultation Paper 66: Prudential requirements for Lloyd's insurance business* (FSA, August 2000)

CR — credit for reinsurance

Cromer WP — *Report of the Lloyd's Working Party* (Lloyd's, December, 1969)

CU — **common-use**. *Cf.* **PU**

CVA — company voluntary arrangement under Insolvency Act 1986, Part I

D

DRs — *see* **Asbestos Documentation Requirements 1**

DTI — Department of Trade and Industry (a UK government ministry)

DTI Prudential Guidance 1996 — Prudential Guidance Note 1996/1: Guidance on systems of controls over general business claims provisions (**DTI**, August 1996)

E

EATD — September 3, 1996 trust agreement between: (1) **Equitas Re** and **Equitas Ltd.** as Grantor; (2) Citibank, NA in its capacity as the American Trustee of each of the separate Lloyd's American Trust Funds created under the Lloyd's American Trust Deed, as Beneficiary; (3) Citibank, NA as Trustee; *also* RRC 16. *Cf.* **LATD**

EATF — the trust fund held in accordance with the **EATD**

ECU — Equitas Claims Unit

EGM — extraordinary general meeting

EL — employers liability

EP — one or more of the seven types of EquitasRe-reinsured SYA participant identified in this Edition

EPP — Estate Protection Plan; a product bought and sold by **Members**

Equitas enterprise — as appropriate depending on context, all, some or any of **Equitas Re**, **Equitas Ltd.**, **Equitas Holdings**, **Equitas Policyholders Trustee**, **Equitas Management Services**, and **EquitasRe-reinsurance Trustees**

Equitas Holdings — Equitas Holdings Ltd. Incorporated in England & Wales, number 3136296. Owns all the shares in **Equitas Re** and **Equitas Policyholders Trustee**. Its one £1 preference share is owned by the **Corporation**. Its two £50 ordinary shares are owned by **EquitasRe-reinsurance Trustees**

Equitas Holdings Articles — **Equitas Holdings'** Articles of Association of adopted by decision of the sole member on August 30, 1996 as amended by April 26, 2001 written members' resolution

Equitas Ltd. — Equitas Ltd. Incorporated in England and Wales, number 3173352. All 780,000,001 £1 ordinary shares are owned by **Equitas Re**

Equitas Management Services — Equitas Management Services Ltd. Incorporated in England and Wales, number 3136297. All shares are owned by **Equitas Holdings**

Equitas NL 1 — *Old and Open Years Reserving Project: Newsletter No. 1* (Lloyd's, November 1993)

Equitas NL 2 — *Old and Open Years Reserving Project: Newsletter No. 2* (Lloyd's, March 1994)

Equitas NL 3 — *Old and Open Years Project: Newsletter No. 3* (Lloyd's, May 1994)

Equitas NL 4 — *Old and Open Years Project: Newsletter No. 4* (Lloyd's, August 1994)

Equitas NL 5 — *Equitas Project: Newsletter No. 5* (Lloyd's, October 1994)

Equitas Policyholders Trustee — Equitas Policyholders Trustee Limited, incorporated in England and Wales, number 3243970. In **RRC 4** and **RRC 7**, "the Trustee". Its one £100 ordinary share is owned by **Equitas Holdings**. *Cf.* **EquitasRe-reinsurance Trustees**

Equitas Re — Equitas Reinsurance Limited, incorporated in England and Wales, number 3136300. In **RRC 1**, "Equitas"; in **RRC 4**, **RRC 5**, **RRC 7** and **EATD**, "ERL". Its one £100 ordinary share is owned by **Equitas Holdings**. Where appropriate, "Equitas Re" refers in this work additionally or instead to **Equitas Ltd.** (especially in relation to **RRC 5**-delegated functions), **Equitas Holdings**, **Equitas Management Services**, and other relevant affiliates and or delegates. Equitas Re sold **EquitasRe-reinsurance** and **EquitasRe-RTC** to **EquitasRe-reinsured SYA participants**

EquitasRe-assured-at-Lloyd's — a person directly or by conventional RTC insured by an **EquitasRe-reinsured SYA participant**; excludes, where the context requires, a SYA participant insured by himself or another SYA participant. The term is not an adjudication of the EquitasRe-assured's-at-Lloyd's relevant rights or of **Equitas Re's** relevant obligations

EquitasRe-reinsurance — the **RRC 4**, §3 product sold to an **EquitasRe-reinsured SYA participant**. *See* **EquitasRe-RTC**

EquitasRe-reinsurance Trust Deed — **RRC 17**

EquitasRe-reinsurance Trustees — the trustees of the (unincorporated) **EquitasRe-reinsurance Trust** created by **RRC 17**. *Cf.* **Equitas Policyholders Trustee**

EquitasRe-reinsured liability — a liability reinsured by **Equitas Re** under **RRC 4**, §3

EquitasRe-reinsured SYA participant — a **RRC 4**, Sch. 2, §1-defined "Name" *simpliciter*; *cf. ibid.*, "Closed Year Name". This work identifies seven types of EquitasRe-reinsured SYA participant. *See* **EP**; **EquitasRe-RTCed SYA participant**; **SYA participant**

EquitasRe-RTC — the RTC effected through **RRC 4**, §3. *Cf.* **conventional RTC**. *See* **EquitasRe-reinsurance**

EquitasRe-RTCed SYA participant — an **EquitasRe-reinsured SYA participant** to the extent that the **RRC 4**, §3 product is a form of RTC

external insurance regulation — *cf.* external financial-protection regulation

F

FAL — "Funds at Lloyd's" as so known in the **Rulebook at Lloyd's**, generally comprising funds (in permitted form) held under instruments such as (in the case of the natural **Member**) the Lloyd's deposit trust deed, **PTD-personal reserve**, and new special reserve trust deed

Fisher WP — *Self-Regulation at Lloyd's — Report of the Fisher Working Party* (Lloyd's, May 1980)

FOIL — Freedom of Information Law (Article 6, Public Officers Law), State of New York

fpe — financial period ended

front office — in the context of the **Lloyd's enterprise**, as between the **assured-at-Lloyd's** and relevant components of the Lloyd's enterprise

FSA — Financial Services Authority. Incorporated in England and Wales, June 7, 1985, number 1920623 under the name Securities and Investments Board; changed its name to FSA October 28, 1997; a private company the liability of whose members is limited to the amount of the guarantees they give to the company. *See* www.fsa.gov.uk

FSA Compensation Scheme Rulebook — the FSA's so-called "COMP Sourcebook" (FSA)

FSA Glossary — FSA Handbook Glossary; made June 21, 2001; in effect from June 21, 2001 (FSA, 2001)

FSA Guidance P2 — Guidance Note P.2 — Systems and controls over general business claims provisions (FSA)

FSA Lloyd's Rulebook — FSA Handbook — Lloyd's Specialist [S]ourcebook LLD; made June 21, 2001; in effect from December 1, 2001 (known at FSA as "LLD")

FSA Rulebook — Interim Prudential Sourcebook for Insurers; made June 21, 2001; in effect from December 1, 2001 (FSA, 2002) (known at FSA as "IPRU(INS)")

fye — financial year ended

G

General Undertaking — the contract of that name between the **Corporation** and a natural **Member**. *Cf.* **MA 1**

GISC — General Insurance Standards Council. *See* www.gisc.co.uk

GISC Commercial Customer Code — *GISC Commercial Code* (**GISC**, June 2000)

GISC Private Customer Code — *GISC General Insurance Code for private customers* (**GISC**, June 2000)

GISC Rules 2000 — General Insurance Standards Council Rules (**GISC**, June 2000)

GR [followed by the relevant UY] — consolidated aggregated **SYA participants'** accounts published by **self-regulators-at-Lloyd's** annually; usually at **Lloyd's**, "global accounts" or "global results"

Guidance Notes: Authorisation Committee — *Guidance Notes for Authorisation Committee* (Lloyd's reference g:j4\IR\LRB2; undated)

H

Higgins WP 1 — *Working Party on the Underwriting Agency System at Lloyd's, Part I: Report on Ownership and Control of Underwriting Agencies* (March 28, 1983) (Lloyd's, 1983)

Higgins WP 2 — *Underwriting Agency System at Lloyd's Part II Working party's report on preferred underwriting and parallel syndicates [and] character and suitability — consultative document* (Lloyd's, September 1983)

HL — House of Lords

I

IBA — insurance broking account

Illinois Business 1998 — *The Illinois Business Process* (Lloyd's, July 10, 1998)

Illinois Directory 1998 — *Illinois Directory of Wordings and Guidance Notes* (Lloyd's, July 1998)

Information and Administration Agreement — *see* **RRC 8**

insurance — includes reinsurance where appropriate

Inward Reinsurance Documentation Requirements 1 — Documentation and Claim Procedure Requirements For Asbestos Bodily Injury Reinsurance Claims, December 21, 2001; also “Reinsurance Documentation Requirements” or “RDRs” (Equitas Re, 2001). *Cf.* **Asbestos Documentation Requirements 1**

IPRU(INS) — *see* **FSA Rulebook**

it, its — in the case of a partnership, includes relevant “their”

J

July 20, 2001 press release — **Equitas Holdings'** July 20, 2001 14-page press release EQ 33 (“Financial results for year ended 31 March 2001”)

Kent RC — *Report of the Review Committee on Council Representation and Voting Arrangements at Lloyd's* (Lloyd's, March 1998)

K

Kent RC Supplement — *Supplementary Report of the Review Committee on Council Representation and Voting Arrangements at Lloyd's* (Lloyd's, September 1998)

Kerr Panel — a committee set up in 1993 by the Chairman of Lloyd's as part of the Lloyd's Legal Disputes Settlement Initiative; also known as the “Legal Panel” and “Legal Advisory Panel”

Kerr Panel Evaluation — the Kerr Panel's report evaluating relevant claims against members' and managing agencies, etc. October 27, 1993 (Lloyd's, 1993)

L

LATD — Lloyd's American Trust Deed for general business, originally adopted August 26, 1939 and amended on October 31, 1947; January 14, 1948; October 2, 1963; September 22, 1982; April 7, 1989; December 9, 1993; July 31, 1995; December 21, 1995; September 3, 1996; amended and restated January 7, 1998. *Cf.* **EATD**; Lloyd's American Trust Deed for long-term business dated January 9, 1991 as amended December 8, 1993

LATF — an individual SYA participant's Lloyd's American Trust Fund created and held under the relevant **LATD**; *cf.* **EATF**

LCO — Lloyd's Claims Office

LCO Claims Scheme 1994 — Lloyd's 1994 Claims Scheme (Lloyd's, July 1, 1994). Superseded by **LCO Claims Scheme 1999**

LCO Claims Scheme 1999 — Lloyd's 1999 Claims Scheme (Lloyd's, 1999)

LIBC — Lloyd's Insurance Brokers' Committee; a committee of the British Insurance & Investments Brokers' Association (the latter is a limited company, number 1293232). *See* **LMBC**

Lioncover — Lioncover Insurance Co. Ltd. Incorporated in England and Wales, January 29, 1987, number 2094618; wholly owned by the **Corporation**

Lioncover Reinsurance Contract — *see* **RRC 19**

liquidation — liquidation under Insolvency Act 1986, including *ibid.*, Parts IV, VI, etc.

LLD — *see* **FSA Lloyd's Rulebook**

Lloyd's — *see* Corporation

Lloyd's Acts 1871-1982 — Lloyd's Acts 1871, 1911, 1951 and 1982

Lloyd's broker — an insurance intermediary registered at Lloyd's as a Lloyd's broker

Lloyd's Deposit — the FAL by that name

Lloyd's enterprise — as appropriate depending on context, all, some or any of the following: **self-regulators-at-Lloyd's**, the **Corporation**, relevant **Corporation** employees, **Members** collectively, **SYA participants** collectively, **members' agencies**, **managing agencies**, **Lloyd's brokers**, the **Central Fund**, and or other relevant persons, bodies, entities, funds, etc. *Cf.* **Lloyd's**

Lloyd's Kentucky Common-Use Trust Deed 1999 — Lloyd's Kentucky Joint Asset Trust Deed (Lloyd's reference MGTA\USTD\KYJATD97) as amended by Deed of Amendment dated 7 February, 1997

Lloyd's Kentucky Personal-Use TD 1999 — Lloyd's Kentucky Trust Deed (Lloyd's reference ustds\kytd99x)

Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed — Amendment and restatement Lloyd's American credit for reinsurance joint asset trust deed dated September 15, 1993 as amended and restated September 7, 1995 and as further amended by Deed of Amendment dated February 7, 1997. *See* **Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund**

Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund — the fund held under the terms of the Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed

Lloyd's US Credit-for-Reinsurance Personal-Use Trust Deed — Lloyd's United States situs credit for reinsurance trust deed; Lloyd's reference ustds\crt99x. *See* **Lloyd's US Credit-for-Reinsurance Personal-Use Trust Fund**

Lloyd's US Credit-for-Reinsurance Personal-Use Trust Fund — the funds held under the terms of the Lloyd's US Credit-for-Reinsurance Personal-Use Trust Deed

Lloyd's US Surplus-Lines Common-Use Trust Deed — Amendment and Restatement Lloyd's American Surplus or Excess Lines Insurance Joint Asset Trust Deed dated September 15, 1993, as amended and restated September 7, 1995, as further amended by Deed of Amendment dated February 7, 1997 and as further amended, with effect from January 1, 1999, by Deed of Amendment dated November 17, 1998. *See* **Lloyd's US Surplus-Lines Common-Use Trust Fund**

Lloyd's US Surplus-Lines Common-Use Trust Fund — the funds held under the terms of the Lloyd's US Surplus-Lines Common-Use Trust Deed

Lloyd's US Surplus-Lines Personal-Use Trust Deed — Lloyd's United States Situs Excess or Surplus Lines Trust Deed (Lloyd's reference mgta\ustd99\sltd99x). *See* **Lloyd's US Surplus-Lines Personal-Use Trust Fund**

Lloyd's US Surplus-Lines Personal-Use Trust Fund — the funds held under the terms of the Lloyd's US Surplus-Lines Personal-Use Trust Deed

LMB Priorities 1999 — *Priorities for growth — Lloyd's Market Board* (Lloyd's, January 1999)

LMBC — London Market Brokers Committee; *see* **LIBC**

Look into Lloyd's 2002 — *Look into Lloyd's* booklet, Issue 1 (Lloyd's, August 2002)

LPSO — LPSO Limited

LSO 1 — Lloyd's Settlement Offer (Lloyd's, December 1993) as amended by Lloyd's Settlement Offer Supplement, December 31, 1993. *See* **Kerr Panel**

LSO 1 Agreement — the unexecuted Names' Settlement Agreement set out at **LSO 1**, Part 9

LSO 2 — the offer set out at **SOD**

M

MA I — Membership Agreement (Corporate Member) between the **Corporation** and a **corporate Member** (Lloyd's). *Cf.* **General Undertaking**

managing agency — a company or partnership registered as a managing agency under Byelaw 4 of 1984. Includes, where appropriate, a run-off agent or agency

Managing Agency & Syndicate Guidance 1998 — *Guidance Notes for Applicants: establishing a new managing agent; establishing a new syndicate; acquiring control of a managing agent, third edition* (Lloyd's, Regulatory Division, May 1998)

Market Bulletin — at Lloyd's, a communication of that type promulgated by **self-regulators-at-Lloyd's**; *cf.* **Regulatory Bulletin**

Member — a member of the **Corporation**. Where appropriate, "Member" includes: (1) an underwriting Member; (2) a former Member, including one **EquitasRe-RTCed**; (3) a deceased Member's personal representative; (4) an insolvent Member's financial custodian; (5) a **SYA participant**

members' agency — a company or partnership registered as a members' agency under Byelaw 4 of 1984

Mkt. Bn. — a **Market Bulletin**

MO — motor

mono-slip — a placing slip subscribed 100% by the participants, or by the one spoastic participant, on only one **SYA**. The slip is thus **mono-subscribed**. *Cf.* **poly-slip**

mono-stamp — a **SYA** comprising a **spoastic SYA** participant. *Cf.* **poly-stamp**

mono-subscribed — a placing slip subscribed 100% by the participants on only one **SYA**. The product is a **mono-slip**. *Cf.* **poly-subscribed**

Morse CR — *A New Structure of Governance for Lloyd's Report of the Working Party Chaired by Sir Jeremy Morse* (Lloyd's, June 1992)

N

NAIC — National Association of Insurance Commissioners

NAIC Review 1998 — *Lloyd's: A Review by US State Insurance Regulators — Report of the Examination Team to the Surplus Lines (E) Task Force on September 14, 1998* (NAIC, 1998)

NAIC Review 1999 — *Lloyd's: A Follow-Up Review by U.S. State Insurance Regulators* (NAIC, December 6, 1999)

natural Member — a **Member** who is a natural person. Often at Lloyd's "individual Member". *Cf.* **corporate Member**

NASAA — North American Securities Administrators Association, Inc.

NASAA Agreement — the July 11, 1996 agreement between: (1) the **Corporation**; (2) the Coordinating Committee of the North American Securities Administrators Association. *See* **State Agreement**

New Central Fund — the **Central Fund** constituted by the **New Central Fund Byelaw**. *Cf.* **Old Central Fund**

New Central Fund Byelaw — New Central Fund Byelaw (No. 23 of 1996), as amended by New Central Fund (Amendment) Byelaw (No. 27 of 1996); New Central Fund (Amendment No. 2) Byelaw (No. 35 of 1996); New Central Fund (Amendment No. 3) Byelaw (No. 22 of 1997); New Central Fund (Amendment No. 4) Byelaw (No. 32 of 1997)

NYID — New York State Insurance Department

NYID Report 1995 — P. Cohen, B. Ganley and J.N. Bushell, *Report on examination of Lloyd's, London as of December 31, 1993* (NYID, May 11, 1995)

O

Old Central Fund — the Central Fund constituted by the **Old Central Fund Byelaw**. *Cf.* **New Central Fund**

Old Central Fund Byelaw — Central Fund Byelaw (No. 4 of 1986; passed July 14, 1986; in force from July 15, 1986), as amended by Central Fund (Amendment) Byelaw (No. 10 of 1987); Central Fund (Amendment No. 2) Byelaw (No. 9 of 1988); Corporate Members (Consequential Amendments) Byelaw (No. 20 of 1993); New Central Fund Byelaw (No. 23 of 1996). *Cf.* **New Central Fund Byelaw**

Old Committee — the Lloyd's Act 1871. s.11 Committee. *Cf.* **Committee**; **Council**; **self-regulators-at-Lloyd's**

Open YA Cash Call Requirements 1999 — Cash Call Statements (Contents and Form) Requirements (1999)

OPIL — overall premium income limit: in simple terms, maximum premium income limit allocated by the Council to a particular underwriting **Member** to be deployed by him on **SYAs** of his choice budding in a particular **UY**. *See* **PIL**

originalis — the **SYA participant** who sold insurance to the **assured-at-Lloyd's**. *Cf.* a subsequent inward-RTCing SYA participant of the same liability

Outline Guide — *An outline guide to individual membership of Lloyd's* (Lloyd's, August 1997)

P

PCW Offer 1 — *The PCW Settlement Offer made by Lloyd's, April 1987, Offer 1 Documentation* (Lloyd's, 1987)

PCW Offer 2 — *The Settlement Offer made by Lloyd's, April 1987, Offer 2 Documentation* (Lloyd's 1987)

personal-use fund — a claims payment securitisation fund regulatorily required to be maintained in relation to, and comprising assets derived from and or attributable specifically and solely to, the relevant insurance business of one particular **Member** and or **SYA participant** and disburseable to meet only his own eligible liabilities; thus a fund addressing the SYA participant's Lloyd's Act 1982, s.8(1) liabilities. *Cf.* **common-use fund**

PIL — premium income limit actually deployed on a particular **SYA**; akin to gambling chips. *See* **OPIL**

poly-slip — a placing slip subscribed (to any extent) by the participants of more than one **SYA**. The slip is thus **poly-subscribed**. *Cf.* **mono-slip**

poly-stamp — a **SYA** comprising more than one participant. *Cf.* **mono-stamp**

poly-subscribed — a placing slip subscribed to, whether 100%, by more than one **SYA stamp**. The product is a **poly-slip**. *Cf.* **mono-subscribed**

Premiums Trust Deeds CD 1998 — Proposed changes to the Premiums Trust Deeds — Consultative Document (Lloyd's, June 8, 1998)

PRF — Personal Reserve Fund

Proportionate Cover — as appropriate, a **Proportionate Cover Plan**, a RRC 4, Sch. 2, §1 Proportionate Cover Rate, a **Retrocession Plan** or a RRC 5, Sch. 3, §17 Retrocession Rate

Proportionate Cover Plan — the **Equitas Re** proportionate cover plan at **RRC 4**, §3.5 and *ibid.*, Sch. 3. *Cf.* **Retrocession Plan**

provisional liquidator — an Insolvency Act 1986, s.135 provisional liquidator

PSLI — personal stop loss insurance

PTD — as appropriate, a premiums trust deed required under **FSA Lloyd's Rulebook**, §10.3.1 (or, previously, Insurance Companies Act 1982, s.83(2)), or any similar deed, under which premium paid further to an insurance contract made with a **SYA participant** is sequestered and available only in accordance with the trusts set out in the deed. *See* **PTF**

PTD 1999 — PTD (general) 1999 and or PTD (short-term life) 1999, as appropriate

PTD (general) — a form of **PTD** for general (rather than short-term life) business

PTD (general) 1999 — Lloyd's Premiums Trust Deed (general business) PTD G 99 (MEM 556)

PTD (short-term life) 1999 — Lloyd's Premiums Trust Deed (long-term business) PTD L 99 (MEM 557)

PTD-personal reserve — a **PTD**'s provisions applicable to the **PRF**

PTD-premium — a **PTD**'s provisions applicable to premium and other relevant income

PTF — funds held under the terms of a **PTD**

PTF 1999 — funds held under a **PTD (general) 1999** and or **PTD (short-term life) 1999**, as appropriate

PTF-personal reserve — that part of a **PTF** containing a **Member's PRF**

PTF-premium — that part of a **PTF** containing the individual **SYA participant's** premium income

PU — personal use; *cf.* **CU**

pure-SYA — the assets and liabilities accruing to the participants on a particular **SYA** other than from inward-RTCed transactions. Usually **at Lloyd's**, "pure year"

R

R&R — *see* **Reconstruction and Renewal**

R&R 1 — *Reconstruction & Renewal* (Lloyd's, May 1995)

R&R 2 — *Reconstruction & Renewal: Progress Report* (Lloyd's, October 1995)

R&R 3 — *Reconstruction & Renewal: papers on alternatives* (Lloyd's, January 1996)

R&R 4 — *Reconstruction & Renewal: Allocating the Settlement* (Lloyd's, February 1996)

R&R 5 — *Reconstruction & Renewal: Indicative Finality Statement* (Lloyd's, March 1996)

R&R 6 — *Reconstruction & Renewal: Guide to your Indicative Finality Statement* (Lloyd's, March 1996)

R&R 7 — *Reconstruction & Renewal: Towards the Settlement* (Lloyd's, May 1996)

R&R 8 — *Reconstruction & Renewal: Indicative Finality Statement* (Lloyd's, June 1996)

R&R 9 — *Reconstruction & Renewal: Guide to your Indicative Finality Statement* (Lloyd's, June 1996)

R&R 10 — *Reconstruction & Renewal: Settlement Information* (Lloyd's, June 1996)

R&R 11 — *Reconstruction & Renewal: Finality Statement* (Lloyd's, July 1996)

R&R 12 — *Reconstruction & Renewal: Finality Statement and Form of Acceptance Guidance Notes* (Lloyd's, July 1996)

R&R 13 — *Reconstruction & Renewal: Settlement Offer* (Lloyd's, July 1996); also **SOD**

R&R 14 — *Reconstruction & Renewal: Guidance Notes: Finality Statement and supporting data* (Lloyd's, August 1996)

RA — report and accounts

RDRs — *see* **Inward Reinsurance Documentation Requirements 1**

Reg. Bn. — a **Regulatory Bulletin**

receivership — receivership under Insolvency Act 1986, Part III

Reconstruction and Renewal — the settlement, **EquitasRe-reinsurance** and **EquitasRe-RTC** exercise at Lloyd's by that name, consummated principally in **RRC 1** (settlement component) and **RRC 4** (**EquitasRe-RTC** component), and other **RRCs**; *see R&R 1 et seq.*

Reconstruction and Renewal Completion Agreement — *see RRC 14*

refusenik — a Member who declined or has declined to enter into **RRC 1**

Regulated Activities Order — Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (2001 SI 544)

Regulatory Bulletin — at Lloyd's, a communication of that type promulgated by self-regulators-at-Lloyd's; *cf.* **Market Bulletin**

Reinsurance and Run-Off Agreement — *see RRC 4*

Reinsurance Contract — *see RRC 4*

Report on Regulation 1999 — Lloyd's Regulatory Board report on regulation in 1999 in Corporation RA fye December 31, 1999, p.37

Retrocession Agreement — *see RRC 5*

Retrocession Plan — the **Equitas Ltd.** scheme at **RRC 5**, §2.4 and *ibid.*, Sch. 3. *Cf.* **Proportionate Cover Plan**

Rights Guide 1996 — *Guide to the Rights of Individual Lloyd's Members* (Lloyd's, May 1996)

RRC — R&R contract

RRC 0 — the August 9, 1996 "Underwriting Agents' Contribution Agreement" between: (1) the **Corporation**; (2) the "HC Agents" as defined; (2) the "PC Agents" as defined; (3) the "EO Agents" as defined; (4) **Equitas Re**

RRC 1 — the R&R "Settlement Agreement" at **SOD**, App. 1 between: (1) the **Corporation**; (2) **Equitas Re**; (3) "Accepting Names" as defined; (4) "E&O Insurers" as defined; (5) "Underwriting Agents" as defined; (6) "Auditors" as defined; (7) "Brokers" as defined; (8) "PSL Underwriters" as defined; (9) **AUA 9**; (10) Citibank NA; (11) Royal Trust Corporation of Canada; (12) "Trustee" as defined

RRC 2 — the "Supervisory Management Agreement" between: (1) **Equitas Re**; (2) the particular **man-aging agency**; (3) the **Corporation**. Entered into at various dates in December 1995

RRC 3 — the "Action Group Settlement Agreement" between: (1) the **Corporation**; (2) the particular Members' action group and each of its members; (3) "E&O Insurers" as defined; (4) "Underwriting Agents" as defined; (5) "Auditors" as defined; (6) "Trustee" as defined

RRC 4 — the September 3, 1996 "Reinsurance and Run-Off Agreement" between: (1) **Equitas Re**; (2) **AUA 9**; (3) "Names" as defined; (4) "Closed Year Names" as defined; (5) the **Corporation**; (6) **Equitas Ltd.**; (7) **AUA 10**; (8) **Equitas Policyholders Trustee**. Sometimes called "RROC" or "the Reinsurance Contract". Amended and corrected by Reinsurance and Run-Off Contract Amendment Agreement, December 17, 1997

RRC 5 — the September 3, 1996 "Retrocession Agreement" at **RRC 4**, App. 2 between: (1) **Equitas Re**; (2) **Equitas Ltd.**

RRC 6 — the August 1996 run-off administration services agreement for prime contractors between: (1) **Equitas Ltd.**; (2) the particular "Contractor"

RRC 7 — the September 2, 1996 declaration of trust at **RRC 4**, App. 1 by, and the trust deed governing, **Equitas Policyholders Trustee**

RRC 8 — the May 2, 1996 "Information and Administration Agreement" between: (1) **Equitas Re**; (2) the particular "Managing Agent"; (3) the **Corporation**

RRC 9 — the September 3, 1996 “Completion Accounts and Co-operation Agreement” between: (1) **Equitas Re**; (2) **Equitas Ltd.**; (3) “Managing Agents” as defined

RRC 10 — the August 15, 1996 “Brokers’ Agreement” between: (1) the **Corporation**; (2) **Equitas Re**; (3) “the Brokers” as defined

RRC 12 — the 1996 “supplemental agreement” concerning the **members’ agency’s** entitlement to and R&R use of “Accelerated Profit Commission” (as defined) between: (1) “Names” as defined; (2) each particular “Members’ Agent” as defined

RRC 13 — the “Run-off Administrative Services Agreement” between (1) **Equitas Ltd.**; (2) the particular “Contractor”; (3) the particular “Run-off Company”

RRC 14 — the September 1996 “Reconstruction and Renewal Completion Agreement” between: (1) the **Corporation**; (2) **AUA 9**; (3) **Equitas Holdings**; (4) **Equitas Re**; (5) **Equitas Ltd.**; (6) **Additional Securities Ltd.**

RRC 16 — *see* **EATD**

RRC 17 — the September 1996 trust deed between: (1) the **Corporation**; (2) the “Original Trustees” as defined; (3) **Equitas Holdings**; (4) **Equitas Ltd.** The trust deed governing the **Equitas Re-insurance Trustees**

RRC 19 — the December 18, 1997 “Lioncover Reinsurance Contract” between: (1) **Equitas Re**; (2) **Equitas Ltd.**; (3) **Lioncover**; (4) **AUA 9**; (5) **Syndicate 9001 Names**; (6) **PCW Names**; (7) the **Corporation**; (8) **SUM**

RROC — *see* **RRC 4**

RTC — reinsurance-to-close (at **Lloyd’s** “RITC”, “R/ITC”, etc.)

RTFR — *Lloyd’s: a route forward — Report of the Task Force January 1992* (Lloyd’s, January 1992)

Rulebook at Lloyd’s — the Lloyd’s enterprise’s own written self-regulatory regime, promulgated by or on behalf of or with the authority of the **Council**, including (as appropriate) such instruments as Lloyd’s Act 1982, s.6 byelaws; Lloyd’s Act 1982, s.6 regulations; Lloyd’s Act 1982, s.6 directions; and such other relevant measures as codes of practice, relevant trust deeds (including those approved but not promulgated by external insurance regulators), and substantive provisions in **Market Bulletins** and **Regulatory Bulletins**. Does not include (for example): (1) regulatory measures promulgated by external regulators; (2) customary practice at **Lloyd’s**

Run-off Administrative Services Agreement — *see* **RRC 13**

run-off company — a company managing the run-off of an insurance enterprise; *cf.* an insurance enterprise in run-off

S

S&M — *Report to the Committee known as the Lloyd’s Settlement Validation Steering Group* (Slaughter & May, April 2, 1996)

SCA 1 — agreement between a **corporate Member** and a **managing agency** at Byelaw 8 of 1988, Schedule 4 (often at **Lloyd’s**, “the managing agent’s agreement (corporate)”). *Cf.* **SUA 1**

scheme of arrangement — a Companies Act 1985, s.425 scheme of arrangement

Security at Lloyd’s 2001 — *Security at Lloyd’s 2001* (Lloyd’s, 2001; the pdf of that name at www.lloyds.com, June 23, 2002). *See* **Security at Lloyd’s 2001 (short)**; **Chain of Security 2002**

Security at Lloyd’s 2001 (short) — *Security at Lloyd’s 2001* booklet (Lloyd’s, 2001). *See* **Security at Lloyd’s 2001**; **Chain of Security 2002**

self-regulators-at-Lloyd’s — as appropriate, the members individually or collectively of all, some or any of the **Committee**; the **Council**; the **Old Committee**; Lloyd’s Market Board; Lloyd’s Regulatory Board; the Lloyd’s Act 1982, s.4 Chairs; and various self-regulatory delegates and servants, whether

proper or not, including (for example) relevant **Corporation** employees. *Cf.* external insurance and other regulators

Settlement Agreement — *see* **RRC 1**

SI — Statutory Instrument

SIA 1 — standard inter-agencies agreement between a **members' agency** and a **managing agency** at Byelaw 8 of 1988, Schedule 2 (often at Lloyd's, "the agents' agreement")

SL — surplus lines

SMA 1 — standard agency agreement between a **Member** and his **members' agency** (and between a Member and a members' agency which happens also to be the **managing agency** of one or more of his chosen SYAs) at Byelaw 1 of 1985, Sch. 1

SMA 2 — standard agency agreement between a **Member** and his **members' agency** (often at Lloyd's, "the members' agent's agreement") at Byelaw 8 of 1988, Sch. 1

Society of Lloyd's — A mythical entity. *Cf.* **Corporation**; **Lloyd's**

SOD — *Settlement Offer Document* (Lloyd's, July 30 1996) formally offering **RRC 1** and formally describing **RRCs 4, 5, 7, 17**, etc.; *also* **R&R 13**

spoastic — a (necessarily corporate) **Member** who is the sole participant on a **SYA**

spoastic RTC — the type of **RTC** described in Byelaw 18 of 1994, Sch. 1, §1, definition of "reinsurance to close", §(f)

stamp — *see* **SYA stamp**

State Agreement — the July 11, 1996 agreement between: (1) the **Corporation**; (2) the participating US state securities regulators. *See* **NASAA Agreement**

statutory administration — administration under Insolvency Act 1986, Part II

SUA 1 — standard agreement between a **natural Member** and a **managing agency** at Byelaw 8 of 1988, Sch. 3 (often at Lloyd's "the managing agent's agreement (general)"). *Cf.* **SCA 1**

SUM — Syndicate Underwriting Management Limited. Incorporated in England and Wales, June 18, 1985, number 1923481; a wholly owned subsidiary of the **Corporation**

Supervisory Management Agreement — *see* **RRC 2**

SYA — one or more **Members** deploy **PIL** in order to sell insurance. Sometimes at **Lloyd's**, "YOAs". *See* **SYA participant**, **SYA stamp** and **syndicate**

SYA participant — a **Member** who has deployed **PIL** on a particular **YA** of a particular **syndicate** and thus a conduit to relevant **personal-use funds** and **common-use funds**. *See* **EquitasRe-reinsured SYA participant**; **SYA stamp**

SYA stamp — all the participants on one particular **SYA**; *see* **SYA participant**

syndicate — (1) an idea in the mind of a **managing agency**; (2) a basis on which SYAs are self-regulated; (3) conceptually, the stem from which **YAs** bud

T

TD — trust deed

TF — trust fund

Treasury — a UK government ministry

Treasury Sel. Comm. I — *Financial Services Regulation: Self-Regulation at Lloyd's of London*, House of Commons, Session 1994-95, Treasury and Civil Service Committee, Fifth Report (HMSO, May 17, 1995)

U

US — United States

US Corporate Instrument — Lloyd's American Instrument 1995 (General Business of Corporate Members), July 31, 1995, as amended December 21, 1995, April 25, 1996, September 3, 1996, January 7, 1998, and by February 3, 1999 deed of amendment and direction. *See* **US Natural Instrument**

US Natural Instrument — Lloyd's American Instrument 1995 (General Business of Individual Members). *See* **US Corporate Instrument**

UY — underwriting year; presently the twelve months beginning January 1

Y

YA — year of account: a collectivisation device, not a time period

YOR — a SYA's year of operation, starting every January 1 and ending the following December 31 for as long as the collectivised accounts of the SYA's participants remain open..

Preface

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SCOPE OF THE PRESENT EDITION

generally; “as at” date

- P.1** The present spin-off from *Astor’s Law of Lloyd’s, 2nd Ed.*¹ (in which many of the issues mentioned in or relevant to this Edition are treated in detail) is a highly simplified, abridged, not-exhaustive, summary primer on Equitas Re’s RRC 4, §3 reinsurance and *ibid.*, §9 run-off-agency functions, intended to put the reader on notice and on inquiry. It is not intended to be a book about the Lloyd’s enterprise. The present Edition aims to state only English law, as at at least March 1, 2002, and some of Equitas Re’s most recent known practices. This Edition takes into account Equitas Holdings’ annual report and audited accounts for the financial year ended March 31, 2002, published July 11, 2002, and mentions the Court of Appeal’s July 26, 2002 ruling in *Lloyd’s v Jaffray* {2b}.² Readers may register for periodic updates. The Author disclaims responsibility for this Edition’s errors resulting from the absence in the public domain of relevant documents or information. The Publisher welcomes comments, corrections, material and suggestions for future Editions. These would be especially useful given the apparent lack of transparency about the affairs of the Lloyd’s and Equitas enterprises at the enterprises themselves and at certain external insurance regulators. Neither this book nor the Author has any relevant connection with the Lloyd’s or Equitas enterprises.

¹ See www.astorlaw.com.

² On appeal from [2000] CLC 725 (Cresswell J): the appeal was dismissed. Reasons apparently follow in October 2002.

this Edition's contents summarised

- P.2** The **Glossary of Abbreviations** is adjunctive to the text. **Chapter 1** (“The Equitas Enterprise”) summarises the Equitas enterprise’s one unincorporated component, EquitasRe-reinsurance Trustees, and its five incorporated components (Equitas Holdings, Equitas Re, Equitas Ltd., Equitas Policyholders Trustee and Equitas Management Services). **Chapter 2** (“Functions”) summarises Equitas Re’s RRC 4, §9 run-off agency functions.
- P.3** **Chapter 3** (“Recourse”) summarises recourse at Lloyd’s and considers the apparently obvious and necessary proposition that every insurance liability incurred at Lloyd’s is payable 100% at Lloyd’s, at least for as long as the Lloyd’s enterprise purports to be solvent and conducts itself as a going concern. The regulatory, commercial, financial, procedural and administrative absurdity is self-evident of any assured-at-Lloyd’s being required to collect any part of his claim against each or any relevant individual³ SYA participant personally and directly. In the ordinary course of business at Lloyd’s, the traditional natural SYA participant never pays and never practicably⁴ could pay any claim, because the regulatory, commercial, financial, procedural and administrative burdens would be too large. For that reason, he is required to retain a managing agency (which performs various essential collectivising roles), and his funding role is confined to providing personal-use and contributing to common-use claims payment securitisation funds at the instance of self-regulators-at-Lloyd’s and external insurance regulators.⁵ The assured’s-at-Lloyd’s recourse lies with those and other relevant funds at the Lloyd’s enterprise. The demerits, already absolute, of an assured-at-Lloyd’s collecting against a SYA participant personally appear to be *a fortiori* in the case of an EquitasRe-reinsured liability. An EquitasRe-assured-at-Lloyd’s debt on any particular EquitasRe-reinsured insurance transaction is inconsequential; if a RRC 1 Accepting Name, the EquitasRe-reinsured SYA participant has been released⁶ from having to provide any personal-use funds to the Lloyd’s enterprise or otherwise to have any assets for any purpose; and the Lloyd’s enterprise continues to trade, to provide relevant common-use funds, to purport to be solvent, and to represent unequivocally, without distinguishing between any type or vintage of insurance contractor between any assured-at-Lloyd’s, that every valid claim is payable 100% at Lloyd’s.
- P.4** Curiously, English law is unclear (although the recent *Equitable Life Assurance Society v Hyman*⁷ is not irrelevant) on at least these elementary points concerning claims payment securitisation at Lloyd’s: (1) the Council’s alleged pure discretion to use the Central Fund, both in any event and specifically to pay EquitasRe-reinsured liabilities; (2) *ditto* in relation to the Corporation’s personal assets; (3) the Council’s purported restriction on itself collecting sufficient Members’ Central Fund contributions to pay those liabilities; (4) the Council’s purported delegation to Members in Corporation general meeting of some of its fundamental Central Fund functions and obligations in relation to those liabilities. The Chapter examines such issues, and discusses the FSA’s apparently illogical and legally multiply questionable regulatory wish⁸ — apparently in relation to all insurance liabilities of all SYA participants — for less than 100% Central Fund securitisation while the Lloyd’s enterprise conducts itself as a going concern and purports to be solvent. To the extent that Equitas Re (whether or not formally insolvent) or any relevant part of the Lloyd’s enterprise seeks to pay valid EquitasRe-reinsured liabilities at less than 100%, such

³ On the use at Lloyd’s of the word “individual”, see p.195.

⁴ *Cf.*, conceptually, the substantial spoastic SYA participant.

⁵ The funds, dynamics, collectivisation, controllers and other relevant features of claims securitisation at Lloyd’s are considered at *Astor’s Law of Lloyd’s*, 2nd Ed.

⁶ See p.169.

⁷ [2000] 3 WLR 529 (HL).

⁸ See FSA Lloyd’s Rulebook, §3.2.1, and p.143.

fundamentals would benefit from judicial or legislative determination. The FSA has so far been unhelpful in addressing them with the Author.⁹

P.5 Since the answers largely depend on understanding the Lloyd's enterprise, the Chapter — which merely hints at relevant complexities¹⁰ and relevant regulation¹¹ — corrects a few of the more

⁹ The Author sent the following email to the FSA in July 2002:-

I have the following questions / points on the Central Fund and would be grateful for your view:- 1. 90% in any event: (1) on what legal basis does the fsa seek to indicate to lloyd's that the central fund should pay out at 90% ("provides protection ... at least equivalent to that available S under the compensation scheme")[: 2. 90% in an insolvency: on what logical basis does the fsa consider 90% is appropriate / feasible in relation to an insolvent lloyd's enterprise? 3. solvent lloyd's: habitual use of the CF as personal-use float: is the fsa aware that the Council deploys the Central Fund as a personal-use-fund 100% float? if it is, on what basis does the fsa suggest 90% deployment while the lloyd's enterprise purports to be solvent? 4. CF never ordinarily used as a fund of last resort: is the fsa aware of any ordinary circumstances in which the Council uses the Central Fund as a common-use fund? 5. NCF [New Central Fund]: vires: what is the fsa's view of the New Central Fund Byelaw's provisions re: (1) prohibition re using NCF to pay EquitasRe-reinsured liabilities (2) the Council empowering Members in Corporation EGM to decide how to apply the NCF (3) the Council disempowering itself from raising NCF contributions from Members. does the fsa take the view that each / any of the foregoing is legally proper and within the Council's powers? 6. distinction Old Central Fund and New Central Fund: the fsa knows of the distinction. but does the fsa agree with the Council's view that there are in fact two separate Central Funds[: 7. is there any basis in law on which the Council can seek to extricate the Lloyd's enterprise from EquitasRe-reinsured liabilities? 8. are EquitasRe-reinsured liabilities considered by the fsa to belong to lloyd's or to Equitas, and if so, as to what %[: 9. is there any legal basis for the apparent practice among Lloyd's brokers to channel a claim on an EquitasRe-reinsured liability to Equitas rather than to Lloyd's[: 10. what procedure does the fsa impose or would consider appropriate for an EquitasRe-assured-at-Lloyd's to present a claim to Lloyd's rather than to Equitas[: 11. what is fsa's view of the notion (among US policyholder lawyers) that channelling the EquitasRe-assured-at-Lloyd's to Equitas ... -- and not telling the EquitasRe-assured-at-Lloyd's of his recourse at Lloyd's -- is[: 12. what fsa arrangements are in place to ensure that the EquitasRe-assured-at-Lloyd's is fully aware of his recourse to the lloyd's enterprise and is able to pursue it (1) generally (2) in relation to the Central Fund (3) in relation to the Corporation's personal assets[: 13. what recourse at lloyd's does the fsa consider is available to the EquitasRe-assured-at-Lloyd's[: 14. does the fsa consider that the EquitasRe-assured-at-Lloyd's is bound to wait for a payout from Equitas Re (including in an Equitas Re insolvency) rather than to recourse to any extent to relevant funds at the Lloyd's enterprise[: 15. does the fsa agree with the Council that use of the Central Fund is wholly in the discretion of the Council[: 16. ditto use of the Corporation's personal assets under Lloyd's Act 1911, s.7[: 17. (1) what regulation does the fsa exercise in relation to lloyd's representations of superior securitisation at lloyd's (2) how does those representations square with fsa 3.2.1 requiring a SOLVENT lloyd's to pay at 90%[: any fsa feedback you can provide on any of these issues would be greatly appreciated.

The FSA replied on August 5, 2002:-

I was a little surprised to get quite so many questions and would have discouraged you from spending the time to send them to me. Your questions seem to fall in to 2 types — those which encourage me to discuss the affairs of a regulated entity and those which ask me to speculate on matters of law. The first I am unable to do and the second is outside my role. I therefore am unable to comment. I note your views on interpreting FSA requirements for Lloyd's central fund.

¹⁰ *Astor's Law of Lloyd's, 2nd Ed.* covers the subject in detail.

¹¹ Relevant regulatory measures include (for example) Lloyd's Acts 1871, 1911, 1951 and 1982; relevant byelaws and regulations such as (for example) Administrative Suspension Byelaw (No. 7 of 1987); Agency Agreements Byelaw (No. 1 of 1985); Agency Agreements Byelaw (No. 8 of 1988); Annual and Extraordinary General Meetings Byelaw (No. 17 of 1996); Annual Subscribers, Associates, Substitutes and Others Byelaw (No. 8 of 1993); Appeal Tribunal Byelaw (No. 32 of 1996); Approval of Correspondents Regulation (No. 4 of 1990); Assignment of Syndicate Participations (Second Nominations) Byelaw (No. 6 of 2000); Auction Byelaw (No. 14 of 1997); Audit Arrangements Byelaw (No. 7 of 1998); Bilateral Arrangements (1998) Byelaw (No. 8 of 1998); Bilateral Arrangements Byelaw (No. 4 of 1999); Binding Authorities Byelaw (No. 9 of 1990); Binding Authorities Regulation (No. 5 of 1990); Central Accounting Byelaw (No. 20 of 1998); Central Fund Byelaw (No. 4 of 1986); Conversion and Related Arrangements Byelaw (No. 22 of 1996); Core Principles Byelaw (No. 34 of 1996); Council and Committee Byelaw (No. 18 of 1996); Council Members and Others (Indemnification) Byelaw (No. 3 of 1993); Council Stage of Disciplinary Proceedings etc. Byelaw (No. 33 of 1996); Disciplinary Committees Byelaw (No. 31 of 1996); Disclosure by Direction Byelaw (No. 21 of 1983); Disclosure of Interests Byelaw (No. 3 of 1984); Financial Guarantee Insurance Regulation (No. 4 of 1989); Financial Services Authority Byelaw (No. 7 of 2001); Following Year Underwriting Regulation (No. 3 of 1989); Glossary Byelaw (No. 8 of 2001); High Level Stop Loss Fund (Winding Up) Byelaw (No. 25 of 1996); High Level Stop Loss Fund Byelaw (No. 12 of 1992); Individual Registration Byelaw (No. 3 of 1998); Information and Confidentiality Byelaw (No. 21 of 1993); Information Relevant to the Operation of Sections 10, 11 and 12 of the Lloyd's Act 1982 Byelaw (No. 1 of 1984); Inquiries and Investigation Byelaw (No. 3 of 1983); Insurance Intermediaries Byelaw (No. 8 of 1990); Insurance Intermediaries Regulation (No. 3 of 1990); Insurance Ombudsman Bureau Byelaw (No. 1 of 1989); Interpretation Byelaw (No. 1 of 1983); Issue of Proceedings by Council Byelaw (No. 18 of 1983); Lloyd's 1994 Claims Scheme Byelaw (No. 4 of 1994); Lloyd's Arbitration Scheme (Members and Underwriting Agents Arbitration Scheme) Byelaw (No. 15 of 1992); Lloyd's Asia Byelaw (No. 17 of 1999); Lloyd's Brokers Byelaw (No. 5 of 1988); Lloyd's Japan Inc. Byelaw (No. 2 of 1997); Lloyd's Policy Signing Office Byelaw (No. 11 of 2000); Maintenance of Byelaws and Regulations Byelaw (No. 14 of 1983); Major Syndicate Transactions Byelaw (No. 18 of 1997); Mandatory Offer Byelaw (No. 5 of 1999); Members' Agents (Australia) Byelaw (No. 14 of 1992); Members' Agents (Information) Byelaw (No. 7 of 1988); Members' Compensation Scheme Byelaw (No. 15 of 1989); Members of the Council (Remuneration) Byelaw (No. 28 of 1993); Members' Ombudsman Byelaw (No. 13 of 1987); Membership (Entrance Fees and Annual Subscriptions) Byelaw (No. 9 of 1987); Membership (Overseas

pernicious myths and terminological infelicities at Lloyd's, the latter especially including "Lloyd's", "individual", "joint asset", "reinsurance to close", "three-year accounting", "underwriter", "underwriting agent", "year", "year of account" and "syndicate". Seldom can the basics of a business as commercially important and legally fecund as the Lloyd's enterprise have been so comprehensively and licentiously mythologised, so abandonedly misdescribed, so defectively understood, and so profoundly misunderstood,¹² especially apparently by US lawyers,¹³ some of whom appear to relish displaying a "dangerous ignorance ... of how insurance emanating from Underwriters at Lloyd's works".¹⁴ Well-informed practice is not assisted by the Corporation's

Deposits) Byelaw (No. 2 of 1992); Membership Byelaw (No. 17 of 1993); Membership, Central Fund and Subscriptions (Miscellaneous Provisions) Byelaw (No. 16 of 1993); Miscellaneous Matters Byelaw (No. 15 of 1983); Misconduct (Reporting) Byelaw (No. 11 of 1989); Misconduct and Penalties Byelaw (No. 30 of 1996); Multiple Syndicates Byelaw (No. 5 of 1989); New Central Fund Byelaw (No. 23 of 1996); Notice of Proposed Arrangements Byelaw (No. 12 of 1994); PCW Syndicates (Exemptions and Miscellaneous Provisions) Byelaw (No. 6 of 1987); Policyholder Complaints Byelaw (No. 10 of 2001); Pool Reinsurance Company Limited (Intermediaries) Byelaw (No. 23 of 1993); Powers of Charging Byelaw (No. 12 of 1990); Premiums Trust Fund and Regulating Trustee Byelaw (No. 22 of 1998); Promulgation of Byelaws and Regulations Byelaw (No. 9 of 1983); Proportional Reinsurance Syndicates Byelaw (No. 9 of 1999); Quorums and Appointments of Committees and Sub-Committees Byelaw (No. 8 of 1992); Reconstruction and Renewal Byelaw (No. 22 of 1995); Register of Members Byelaw (No. 22 of 1983); Reinsurance to Close (Restriction) Byelaw (No. 15 of 1993); Reinsurance to Close Byelaw (No. 6 of 1985); Related Parties Byelaw (No. 2 of 1986); Review Powers Byelaw (No. 5 of 1986); Run-off Accounts (Intermediaries) Byelaw (No. 10 of 1991); Run-Off Companies Byelaw (No. 2 of 1995); Solvency and Reporting Byelaw (No. 13 of 1990); Substitute Agents Byelaw (No. 20 of 1983); Suspension from Membership of the Council, the Committee and any Sub-Committee Byelaw (No. 16 of 1983); Suspension: Supplementary and Consequential Matters Byelaw (No. 19 of 1983); Syndicate Accounting Byelaw (No. 18 of 1994); Syndicate Meetings Byelaw (No. 11 of 1994); Syndicate Pre-emption Byelaw (No. 19 of 1997); Syndicate Premium Income Byelaw (No. 6 of 1984); Syndicate Premium Income, (Monitoring) Regulation (No. 1 of 1984); Training and Development Byelaw (No. 23 of 1998); Transitional and Conversion Arrangements (Corporate Members) Regulations (No. 1 of 1994); Umbrella Arrangements Byelaw (No. 6 of 1988); Underwriting Agents (Amendments No. 16) Byelaw (No. 15 of 1999); Underwriting Agents Byelaw (No. 4 of 1984); Waiver Byelaw (No. 3 of 1999), etc.; relevant Market Bulletins and Regulatory Bulletins, some of which can be found at www.lloydsoflondon.com/bulletins.htm; FSA Lloyd's Rulebook; other external insurance regulation in UK and every other relevant jurisdiction, etc.

- ¹² For a typical example chosen randomly from hundreds of similar cases, see *State ex rel. Barclays Bank PLC v Hamilton Cty. Court of Common Pleas*, 660 N.E.2d 458 (1996):-

Lloyd's is ... an insurance marketplace The Corporation of Lloyd's ("the Corporation") ... regulates Lloyd's insurance market. Through the Council of Lloyd's ("Council"), the Corporation promulgates standard form agreements which govern the relationships among the entities involved with the market. The Council acts as trustee of a fund maintained to ensure payment of policyholder losses.

Lloyd's is not a marketplace. The Corporation does not primarily regulate anything. The Corporation does not promulgate rules through the Council. The Council does not appear to act as a trustee of anything.

- ¹³ To take as examples only US federal and state Membership litigation (*cf.* a similar considerable body of US federal and state coverage litigation), see for example the erroneous heading in *Haynsworth v The Corporation of Lloyd's, a/k/a Lloyd's of London, a/k/a Lloyd's, a/k/a the Council of Lloyd's, a/k/a the Society of Lloyd's, a/k/a the Committee of Lloyd's*, 121 F.3d 956 (5th Cir. 1997). The Corporation is not synonymous with the Council or Committee, and there is no such legal entity as "the Corporation of Lloyd's", "the Society of Lloyd's", or "Lloyd's of London". See similarly *Roby v Lloyd's*, 996 F.2d 1353 (2d Cir. 1993); *In the Matter of Lloyd's of London* [etc.] Pennsylvania Securities Commission, Administrative Proceeding Docket No. 9412-10, Summary Order to Cease and Desist, §1 (p.1) refers to "the Council of Lloyd's ... also known as the Society of Lloyd's"; *Sizemore v Lloyd's*, Case No. 96-1336-II, Chancery Court of Davison County, Tennessee at Nashville (state securities regulatory suit), in which the defendant was "Lloyd's, also known as Lloyd's of London, also known as the Society of Lloyd's, an unincorporated association doing business as the Corporation of Lloyd's, established by Act of Parliament, also known as the Council of Lloyd's"; *Richards v Lloyd's of London* (US District Court for the Southern District of California, Civil action no. 94-1211-s (POR); *In the Matter of Lloyd's of London* [etc.] Pennsylvania Securities Commission, Administrative Proceeding Docket No. 9412-10, Summary Order to Cease and Desist, §1 (p.1; the defendant is "the Council of Lloyd's ... also known as the Society of Lloyd's; the Corporation of Lloyd's..."). The invention in pre-R&R US Membership litigation of "the Society and Council of Lloyd's" appears to be based on a misconstruction by US lawyers of the relationship between the Corporation and the Council, or perhaps on a misinterpretation of the phrase "Society and Council of Lloyd's" as used in self-regulators'-at-Lloyd's documentation such as the standard form of FAL letter of credit for US Members, and obsolete General Undertakings.

- ¹⁴ *Farr Man Coffee Inc. v Chester*, 88 Civ. 1692 (DNE) (S.D.N.Y. 1993); LEXIS 8992, *133. On elementary judicial error, and still confining the examples to Membership (*cf.* coverage) litigation, see for example *Allen v Lloyd's*, 94 F.3d 923 (4th Cir. 1996) (Judge Niemeyer; "The market today is a large, complex arrangement under which "Names," who as members of the Society of Lloyd's become members in the market, join individual underwriting syndicates formed to insure ... risks") — there is no such thing as the Society of Lloyd's; the Market does not have members; Members are not necessarily SYA participants; SYA participants do not join syndicates; syndicates do not sell insurance. See similarly *Richards v Lloyd's*, 135 F.3d 1289 (9th Cir. *en banc* 1998) (Goodwin CJ; "Lloyd's is a market in which ... Underwriting Agencies compete for underwriting business. ... Underwriting Agencies, or syndicates, compete for ... insurance business. Each

current website's¹⁵ propagation of one of the oldest and most pernicious myths at Lloyd's, *viz.*, that syndicates have members and sell insurance.

- P.6 Chapter 4** (“Insolvency”) summarises some insolvency precipitates and processes relevant to Equitas Re; Equitas Policyholders Trustee's RRC 7 role — imposed as part of R&R and without the EquitasRe-assured's-at-Lloyd's consent — in marshalling an insolvent Equitas Re's relevant assets and distributing them to itself in expenses and then to relevant EquitasRe-assureds-at-Lloyd's; Equitas Re's RRC 4, Sch. 3 Proportionate Cover Plan; and Equitas Ltd.'s RRC 5, Sch. 3 Retrocession Plan. The Chapter assumes knowledge of relevant insurance insolvency precipitates and processes.
- P.7 Appendix 1** offers critically annotated extracts from some of the RRCs most relevant to EquitasRe-reinsurance — *viz.*, RRCs 1, 4, 5, 7 and 17. **Appendix 2** offers *ditto* from the governing instruments of some¹⁶ of the most significant claims payment securitisation trust funds, *viz.*, the EATD, LATD, Lloyd's US Surplus-Lines Common-Use Trust Deed, and Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed. US federal and state cases on Equitas Re are rare indeed in which either side shows the slightest sign of having read all relevant instruments. The **Lexicon of Definitions**, between the Appendices and **Index**, facilitates comparison of instruments.

excluded matters

- P.8** The reader is presumed familiar with basic English law concerning (for example) companies, insolvency, insurance, insurance regulation, and trusts. For space reasons and to enable this book to retain its introductory summary character, this Edition focuses principally on the English essentials of the Equitas enterprise from the perspective of the front office. Consideration has been omitted of a significant quantity of back-office and other matters such as Equitas Re's solvency and other aspects of its finances; regulation concerning preparation of its accounts; R&R's detailed political, legal, regulatory and financial history and its detailed implementation;¹⁷ relevant Australian, Canadian, Illinois and Kentucky matters; and Centrewrite and Lioncover (to each of which Equitas Re is in many ways closely analogous). It is presently hoped to include in future Editions expert US commentary on relevant FOIL-obtained documentation,¹⁸ and on relevant US

Underwriting Agency is controlled by a Managing Agent.... By becoming a Member, the Names obtain the right to participate in the Lloyd's Underwriting Agencies”) — Lloyd's is not a market; underwriting agencies are not synonymous with syndicates; an underwriting agency is not controlled by a managing agency; Membership has nothing to do with participation in an underwriting agency; a SYA participant does not participate in a managing agency. See also *Riley v Kinley Underwriting Agencies, Ltd.* 969 F.2d 953 (10th Cir. 1992) at 954 (Judge Kelly) refers to “Society and Council of Lloyd's, a British entity (Lloyd's)”. Infelicitous judicial terminology concerning the Lloyd's enterprise has been long established in England: see for example *Lloyd's v Harper* (1880) 16 Ch.D. 290, 312 (James LJ; “Lloyd's Association”); *ibid.*, 316 (Cotton LJ; “There were two sets of members of Lloyd's — underwriting and subscribing members”). And see recently *R v Inland Revenue Commissioners, ex parte MF.K. Underwriting Agents Ltd.* [1990] 1 WLR 1545, 1549 (Bingham LJ; “Lloyd's syndicates ... are formally dissolved and re-formed at the end of each calendar year, the assets of the old syndicate being transferred to the new”) — inaccurate in relation to syndicates (which do not have assets and are not formed or re-formed in the way stated) and (since three-YOR closing is permissive, not mandatory) in relation to participants on any YA of any particular syndicate. English judges rarely if ever refer correctly to SYA participants, preferring the erroneous “syndicate”.

¹⁵ <http://www.lloydsoflondon.com/america/index.htm>, July 15, 2002, 2.30pm. “Welcome to Lloyd's in America — Before using these pages it is important to understand the unique nature of Lloyd's and how it operates in the US. Lloyd's is an insurance market, not a single insurance company. The Market consists of a number of separate businesses (syndicates) ...” Lloyd's is not a market; it is a corporation. A syndicate is not a business, does not trade, and does not sell insurance.

¹⁶ Because of space constraints, the texts of the ECTD, EAusTD, PTD and some other claims securitisation trust funds are not included.

¹⁷ *Astor's Law of Lloyd's*, 2nd Ed. covers the subject in detail.

¹⁸ They include (for example): (1) DTI's authorisation letter to Equitas Re and Equitas Ltd., September 3, 1996; (2) Superintendent Muhl letter to David Rowland (Lloyd's) and Peter Von Kaufmann (Citibank) approving transfer of assets from LATFs to EATF, September 3, 1996; (3) Superintendent Muhl letter to David Rowland (Lloyd's) and Peter Von Kaufmann (Citibank) approving transfer of assets from LATFs to EATF subject to conditions, September 3, 1996; (4) David Westby (Lloyd's) to Vinnie Laurenzano (NYID) re annual list of underwriting members, August 30, 1996; (5) David Westby (Lloyd's) to Vinnie Laurenzano (NYID) re relevant documentation, August 30, 1996; (6) Jonathan Spencer (DTI)

and cross-border issues including US federal and state jurisprudence concerning Equitas Re's personal liability to the EquitasRe-assured-at-Lloyd's. This Edition contains no detailed consideration of the Lloyd's enterprise, including (for example) how SYA participants' liabilities are ordinarily funded at Lloyd's, and relevant pre- and post-R&R litigation by Members.¹⁹

DOCUMENTATION

classification system of R&R documents

- P.9** The Glossary of Abbreviations elucidates this work's classification system for relevant RRCs and standard agency agreements.²⁰ The absence until the present work of any taxonomy for any RRC has obscured R&R's considerable documentary extent. Terms such as "RRC 19" conveys unambiguously that there may be at least eighteen other R&R contracts to consider.

reproduced documents: sources; versions; fidelity

- P.10** The versions of R&R contracts and trust deeds extracted in this Edition's Appendices have been provided by practising lawyers professionally involved in Equitas matters and or obtained through FOIL request. No reproduced document appears to be subject to any restriction on dissemination. Curiously, given their public importance, RRCs 4, 5, 7 and 17 appear to exist in more than one final official version.²¹ Of the versions available to the Publisher, that presently appearing to be the latest has been used in each case. Except underlining and immaterial layout, effort has been made to reproduce each document's text faithfully, including obvious typing errors (noted in the annotations). Not reproduced are provisions apparently irrelevant to insurance disputes such as, for example, RRC 4, Sch. 4 ("Consideration"), *ibid.*, Sch. 5 ("Return premium"), RRC 5, Sch. 2 ("Profit participation"), and some provisions relating to internal trust administration.

to Laurenzano (NYID) re Equitas reporting, September 3, 1996; (7) Jane Barker (Equitas) to Laurenzano (NYID) re notice and examination in event of proportionate cover, September 3, 1996; (8) Westby (Lloyd's) to Laurenzano (NYID) with attached September 3, 1996 letter from Jeffrey Mace (LeBoeuf) to Laurenzano (NYID) re managing agencies compliance with byelaws, August 30, 1996; (9) Jeremy Heap (Equitas) to Laurenzano (NYID) re Equitas premiums and reserves, August 30, 1996; (10) Martin Brebner (DTI) to Laurenzano (NYID) re amount of US dollar liabilities, August 30, 1996; (11) N.A. Jones (Citibank) to Laurenzano (NYID) re transfer to LATFs from Central Fund, August 30, 1996; (12) Jane Barker (Equitas) to Laurenzano (NYID) re top-up, August 30, 1996; (13) Agreement between Equitas Ltd. and NYID, September 3, 1996; (14) Collateral Agreement between Equitas Ltd. and NYID, September 3, 1996; (15) Agreement amending September 3, 1996 Collateral Agreement between Equitas Ltd. and NYID (undated?); (16) Custody Agreement relating to Charged Accounts between Bankers Trust Company, Equitas Ltd. and NYID, September 4, 1996; (17) Custody Agreement relating to Charged Accounts between Bankers Trust Company, Equitas Ltd. and NYID, October 1996; (18) Memorandum of Waiver between Equitas Ltd. and NYID, September 3, 1996; (19) UCC-1 Financing Statement between Equitas Ltd. (debtor) and NYID (secured party) (undated?); (20) Assignment Agreement Financial Reinsurances AUA 9, the Relevant Names, Lloyd's, AUA 10, Equitas Re, September 4, 1996; (21) Assignment Agreement between Equitas Ltd., and Citibank, September 4, 1996.

¹⁹ Including consideration of the *Lloyd's v Jaffray* {2} fraud defence and counterclaim: on July 26, 2002, the Court of Appeal dismissed the counterclaimant-appellant Members' appeal from [2000] CLC 725 (Cresswell J).

²⁰ As to terminology at Lloyd's, Byelaw 8 of 1988, *passim* illustrates the problem, especially *ibid.*, §10(6) ("agreements in the terms of the standard members' agent's agreement, ... agreements in the terms of the standard agents' agreement and ... agreements in the terms of the standard managing agent's agreement (general)"); and see recently Mkt. Bn. Y2113, August 12, 1999 ("Agency agreements 2000"), referring to SMA 2 as "The Agency Agreement" and SCA 1 as "The Managing Agents' Agreement" (Corporate Member)".

²¹ A number of versions of RRCs 4, 5, 7 and 17 exists. Given the style of version number (bottom-left corner of each version: for example FW962500.261/2+ and FW960630.015/58+; the style is used in other RRCs), query which one is definitive.

SOME RELEVANT RECENT DEVELOPMENTS

regulation

- P.11** GISC has assumed (apparently until 2004) the self-regulatory function in relation to Lloyd's brokers previously exercised by self-regulators-at-Lloyd's: Insurance Brokers (Registration) Act 1977²² has been repealed; Lloyd's Brokers Byelaw (Byelaw 5 of 1988) has been largely revoked; and Code: Lloyd's Brokers has been revoked. The FSA²³ has assumed in relation to the authorisation and regulation of UK insurance companies the regulatory role previously exercised by the Treasury (and before that the DTI). Insurance Companies Act 1982 and a considerable quantity of relevant subordinate legislation have been repealed: see now (for example²⁴) the FSA Rulebook and FSA Compensation Scheme Rulebook. *Per* Financial Services and Markets Act 2000, Part XIX and following the comprehensive self-regulatory fiascos²⁵ at Lloyd's that produced R&R, the FSA now also supervises the Lloyd's enterprise and the Council's current exercise of its Lloyd's Act 1982, s.6 functions: see (for example) FSA Lloyd's Rulebook, in which the FSA attributes²⁶ primary self-regulatory functions to the Corporation which the latter does not have and never has had; parrots the myths that the Corporation is a society²⁷ and²⁸ that a syndicate is a collection of insurers; seeks in unenforceable and otherwise meaningless provisions to meaningfully financially regulate (purportedly in the interests of EquitasRe-assureds-at-Lloyd's) former Members²⁹ — and apparently misses,³⁰ on various levels, that self-regulators-at-Lloyd's invariably and necessarily use the Central Fund as a 100% personal-fund float, and the multiple logical absurdity of an insurance rulebook venturing to suggest³¹ that a Lloyd's enterprise doing business as usual and purporting to be solvent maintain a compensation fund of less than 100% for valid claims.

*cases***front office**

- P.12** Relevant post-R&R front-office litigation in various US fora has been not insignificant concerning Equitas Re's direct personal liability to, and susceptibility to suits brought in US federal and state court by, US EquitasRe-assureds-at-Lloyd's.³² There has been the occasional English case³³ directly involving Equitas Re. A significant quantity of English litigation will presumably follow Equitas Re's insolvency (including its invocation of proportionate cover), including on the Council's obligation to use the Central Fund and the Corporation's personal assets to pay

²² Repealed by Financial Services and Markets Act 2000, Sch. 22.

²³ See generally Financial Services and Markets Act 2000; www.fsa.co.uk.

²⁴ See p.26.

²⁵ See for example *Treasury Sel. Comm. 1, passim*.

²⁶ See for example FSA Glossary: "[']Society's regulatory functions['] [means] the Society's powers, duties or functions in relation to members or underwriting agents which are or may be exercised for the purposes of supervising or regulating the market at Lloyd's". The FSA Glossary is confusing the Corporation (which has no primary self-regulatory functions) with the Council: only the latter is empowered to supervise and regulate the business of insurance at Lloyd's: see Lloyd's Act 1982, s.6(1). See similarly FSA Lloyd's Rulebook, §3.2.1G: the Corporation has no primary self-regulatory functions in relation to the Central Fund, as is obvious from the Old Central Fund Byelaw and the New Central Fund Byelaw.

²⁷ *Per* FSA Glossary, "[']Society['] [means] the society incorporated by Lloyd's Act 1871 by the name of Lloyd's". This error is pandemic: see p.184.

²⁸ See FSA Glossary. the entry "syndicate", *viz.*, "one or more persons, to whom a particular syndicate number has been assigned by or under the authority of the Council, carrying out or effecting contracts of insurance written at Lloyd's." The definition indicates fundamental misunderstanding of syndicates: see p.186.

²⁹ See p.173.

³⁰ At FSA Lloyd's Rulebook, §3.2.1G.

³¹ See p.143.

³² See p.82.

³³ See for example *Baker v Black Sea & Baltic General Insurance Co. Ltd. and Equitas Reinsurance Ltd.* [1998] 1 WLR 974 (HL); *Mander v Equitas Ltd.* [2000] Lloyd's Rep IR 520 (Morison J); *Trygg Hansa Insurance Co. Ltd. v Equitas Ltd.* [1998] 2 Lloyd's Rep. 439 (Judge Jack QC).

claims (including by way of honouring the Lloyd's enterprise's "chain of security" representations to actual and prospective EquitasRe-assureds-at-Lloyd's), the law in relation to which is presently unsatisfactory. *Equitable Life Assurance Society v Hyman*³⁴ contains interesting analogies to the Council's dilemma.

back office

- P.13** There has been a significant quantity (though not matching the torrent³⁵ of pre-R&R back-office litigation) of not wholly irrelevant post-R&R back-office litigation in England and various US fora in relation to EquitasRe-reinsured SYA participants personally. For example: (1) on the Council's right to devise and implement R&R in the first place;³⁶ (2) irrevocable authority conferred by the SYA participant on a managing agency;³⁷ (3) self-regulators' at Lloyd's quantification of the EquitasRe-RTC premium;³⁸ (4) RRC 4's "pay now" clause;³⁹ (5) the Corporation's right to summary judgment for EquitasRe-RTC premium;⁴⁰ (6) enforcement in foreign states of judgments obtained in England;⁴¹ (7) fraud by self-regulators-at-Lloyd's.⁴² Dismissing on July 26, 2002 the appeal in *Lloyd's v Jaffray* {2},⁴³ the Court of Appeal held that the counterclaimant appellant Members had failed to prove that, in publishing patently misleading promotional material to actual and prospective Members, self-regulators-at-Lloyd's had acted dishonestly.

ACKNOWLEDGMENTS

- P.14** The Author is obliged to the New York State Insurance Department for its FOIL responses; to those who have shared and continue to share with him their relevant experience and expertise, and to those who have been urging him to "finish the...book" (meaning *Astor's Law of Lloyd's*, 2nd Ed., not this one).

RJA
August 23, 2002

³⁴ [2000] 3 WLR 529 (HL).

³⁵ See p.A4.

³⁶ See for example *Price and Price v Lloyd's* [2000] Lloyd's Rep IR 453 (Colman J).

³⁷ *Lloyd's v Leighs* {1a} [1997] CLC 759 (Colman J); *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398 (CA).

³⁸ See for example *Price and Price v Lloyd's* [2000] Lloyd's Rep IR 453 (Colman J); *Lloyd's v Leighs* {1a} [1997] CLC 759 (Colman J); *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398 (CA).

³⁹ *Lloyd's v Leighs* {1a} [1997] CLC 759 (Colman J); *ibid.* {2a} [1997] CLC 1012 (Colman J); *ibid.* {1b & 2b} [1997] CLC 1398 (CA).

⁴⁰ *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA).

⁴¹ See for example *Lloyd's v Estate of McMurray* 274 F.3d 1133 (7th Cir. 2001); *Lloyd's v Ashenden* 233 F.3d 473 (7th Cir. 2000); *Lloyd's v Grace* No. 604065/98, *slip op.* (N.Y. Sup. Ct. Nov. 12, 1999). See also *Business Insurance*, August 23, 1999, p.1-2 ("U.S. members must battle Lloyd's in England, judge rules"). And see US Bankruptcy Reform Act (Public Law No. 106-113), Sec.1310 ("Enforcement of certain foreign judgments barred"), enacted to assist US judgment-debtor Members.

⁴² See for example *Lloyd's v Jaffray* {2b}, CA, July 26, 2002 on appeal from *ibid.* {2a} [2000] CLC 725 (Cresswell J).

⁴³ On appeal from [2000] CLC 725 (Cresswell J).

1: The Equitas Enterprise

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SUMMARY

components of the Equitas enterprise
generally**1.1** The Equitas enterprise, constructed by self-regulators-at-Lloyd's in cooperation with (among others) the DTI¹ as an intrinsic part of R&R,² principally comprises:-³

(1) the (presently seven⁴) unincorporated EquitasRe-reinsurance Trustees,⁵ who jointly own⁶ both Equitas Holdings' ordinary shares ultimately on trust for various charitable bodies⁷ but principally for the express⁸ overriding purpose of advancing and protecting the relevant interests of EquitasRe-reinsured SYA participants "as a whole" in relation to Equitas Re's discharge of its RRC 4, §3 reinsurance obligations. Their functions set out in RRC 17,⁹ the trustees own the ordinary share in Equitas Holdings and thus theoretically¹⁰ control all the "Equitas" companies;

(2) five distinct¹¹ companies incorporated in England (and resident in the UK for tax purposes¹²), each a former Corporation subsidiary¹³ and each materially formally¹⁴ linked to the Lloyd's enterprise. **Equitas Holdings**¹⁵ (wholly owned¹⁶ by the EquitasRe-reinsurance Trustees jointly) is a mere holding company. **Equitas Re**¹⁷ (wholly owned¹⁸ by Equitas Holdings) and **Equitas Ltd.**¹⁹ (the group's principal operating company;²⁰ wholly owned²¹ by Equitas Re) are authorised insurance companies. *SOD* represented²² that Equitas Re's and Equitas Ltd.'s articles of association

¹ *SOD*, p.82.

² See p.9.

³ See generally for example *SOD*, Ch. 7 ("Equitas group").

⁴ See p.15.

⁵ See p.15.

⁶ See p.20; RRC 17, recitals (B) and (C); *SOD*, p.81.

⁷ See RRC 17, §3.1.

⁸ See RRC 17, §2.1.

⁹ See this Edition, Appendix 1.5. The trustees, being unincorporated, are not governed by a memorandum or articles of association; cf. each of the five companies in the Equitas group.

¹⁰ On the trustees' supervisory functions in practice, see p.27.

¹¹ The distinction between the Equitas companies is not always observed. For example, it is not unusual for the plaintiff EquitasRe-assured-at-Lloyd's in a US coverage suit to seek to join — with Equitas Re and or Equitas Ltd. — Equitas Holdings, Equitas Policyholders Trustee and or Equitas Management Services, the latter three being largely or wholly irrelevant to any coverage action and the error demonstrating ignorance to the other side. And see for example the Corporation's website (www.lloyds.com; July 25, 2001), glossary, "Equitas" ("The corporate entity into which the general business insurance liabilities of Lloyd's syndicates allocated to the 1992 and prior years of account have been reinsured." — the inappropriate use of "the" with "years of account" suggests misunderstanding of SYAs and UYs.

¹² See for example *SOD*, p.83.

¹³ *SOD*, p.81.

¹⁴ Via Equitas Holdings' "Lloyd's Director": see p.22.

¹⁵ See p.19.

¹⁶ See p.20.

¹⁷ See p.26.

¹⁸ See p.28.

¹⁹ See p.39.

²⁰ See p.39.

²¹ See p.39.

²² *SOD*, p.81 ("The proposed Articles of Association of the Equitas Group companies will contain restrictions on the business which the Equitas Group companies may undertake, which will effectively limit the scope of their activities to running off the 1992 and prior business and related activities"). And see *ibid.* ("The authorised companies within the Equitas Group are not permitted to reinsure any business except pursuant to the Reinsurance Contract and the Retrocession Agreement and related ancillary transactions connected with the Reconstruction and Renewal plan"). *Ibid.* does not specify the source of the restriction. On the DTI notices of requirements, see p.A92.

would limit the scope of their activities to running off the 1992 and prior business and related matters, but only Equitas Ltd.'s articles appear to do so.²³ Equitas Re has sold each EquitasRe-reinsured SYA participant a product which appears to be reinsurance: see RRC 4, §3. Equitas Re is,²⁴ separately, each EquitasRe-reinsured SYA participant's *ibid.*, §9 run-off agent in relation to the reinsured liabilities — a function which, like the *ibid.*, §3 reinsurance obligation itself, Equitas Re has wholly delegated to Equitas Ltd. **Equitas Policyholders Trustee** (wholly owned²⁵ by Equitas Holdings) has²⁶ various powers and functions in relation to Equitas Re's performance of its RRC 4, §3 reinsurance obligation, including to realise, protect and distribute Equitas Re's personal assets in the event of the latter sustaining a RRC 7, §2.15 "Insolvency Event". **Equitas Management Services**²⁷ (wholly owned²⁸ by Equitas Holdings) is a mere services company. Equitas Holdings' CEO has described the group's principal purpose as being to implement or further R&R's EquitasRe-reinsurance component, principally through four core activities, *viz.*, managing claims, collecting the proceeds on outward reinsurance claims, investing assets, and "establishing efficient and effective administrative, operating and control functions that support the other three".²⁹

management

- 1.2 As well as common ownership, there is common management. For example, Equitas Re's board is required to be identical to Equitas Holdings' board,³⁰ and Equitas Ltd.'s board is required to be identical to Equitas Re's board.³¹ Common to all three boards is the "Lloyd's Director",³² an appointment made by self-regulators-at-Lloyd's as an incident of the Corporation's ownership of Equitas Holdings' Deferred Share.³³ Administrative divisions include "Finance" (financial control, treasury, actuarial and internal audit),³⁴ "Legal" (legal and company secretarial administration services to the Equitas Group),³⁵ "Human Resources" (recruitment, compensation and bene-

²³ The relevant parts of Equitas Re's September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution) suggest no restriction: indeed, see *ibid.*, §17 ("Matters requiring consent of the Shareholder"), §(b) ("engage in any business other than to act as a reinsurance company and all activities in connection with that business ..."). Cf. Equitas Ltd.'s September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution), §17(b) (identical to Equitas Re's Articles §17 *cit.*) but also *ibid.*, §17(c) ("reinsure any liabilities other than by way of retrocession from Equitas Reinsurance Limited"); the nature of that retrocession is not elaborated. Neither Equitas Policyholders Trustee's August 23, 1996 Memorandum of Association nor its August 23, 1996 Articles of Association limits its business, or refers to Equitas Re's or Equitas Ltd.'s business (on the validity of acts done by a company *ultra* its memorandum of association, see generally Companies Act 1985, s.35). *Ditto* Equitas Holdings' December 5, 1995 Memorandum of Association. And see its August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §24 ("Matters requiring consent of the Ordinary Shareholders"), §(g) ("vary in any respect the memorandum or the articles of association of any subsidiary of the Company"); nor do those Articles suggest any restriction on Equitas Holdings' own business.

²⁴ See RRC 4, §9 *et seq.*

²⁵ See p.40.

²⁶ See generally RRC 7.

²⁷ See p.42.

²⁸ See p.42.

²⁹ Equitas Holdings RA fpe September 4, 1996, p.6 (Chief Executive Officer's Review).

³⁰ See p.28. And see for example *SOD*, p.88.

³¹ See p.40.

³² See p.22.

³³ See p.20.

³⁴ *SOD*, p.88.

³⁵ *SOD*, p.88:-

Legal will provide legal and company secretarial administration services to the Equitas Group. The in-house legal expertise will focus mainly on areas of corporate, general commercial and specialist insurance law. The legal function will have overall responsibility for regulatory and compliance matters in close co-operation with other functions. It may also provide certain services to the Equitas Trust [EquitasRe-reinsurance Trustees].

fits, employee relations, training, career development and performance appraisal),³⁶ and “Communications” (media and corporate communications).³⁷ There are also five board committees,³⁸ viz., Investment,³⁹ Claims and Commutations,⁴⁰ Audit and Compliance,⁴¹ Remuneration,⁴² and Nominations.⁴³

connection with the Lloyd’s enterprise

- 1.3** The Equitas enterprise, sometimes described as “Lloyd’s run-off operation”,⁴⁴ avers that it is “independent and separate from Lloyd’s”.⁴⁵ Apparently to the contrary (for example): (1) the Corporation owns the Deferred Share⁴⁶ — apparently no mere token — in Equitas Holdings; (2) that share entitles the Corporation (in practice the Council) to appoint its choice of “Lloyd’s Director”⁴⁷ — presumably no mere sinecure — to Equitas Holdings’ board and thus to the board of Equitas Re and Equitas Ltd.; (3) the EATF⁴⁸ on the one hand and, on the other, relevant LATFs,⁴⁹ are financially⁵⁰ and administratively⁵¹ closely connected (until recently the trust funds shared the same trustee⁵²); (4) the Corporation has given various claims payment securitisation indemnities and guarantees beneficial to Equitas Re;⁵³ (5) apparently the Equitas Market Practices Advisory Board assists “in maintaining an effective relationship with the ongoing Lloyd’s market”;⁵⁴ (6) practical connections include (for example) use of the same lawyers and the same US bank (Citibank NA). It appears to be the case, generally, that the Equitas enterprise is “not subject to the Lloyd’s regulatory regime”.⁵⁵

³⁶ SOD, p.88.

³⁷ SOD, p.88.

³⁸ See generally Equitas Holdings RA fye March 31, 2002, p.26-27; SOD, p.92-93.

³⁹ SOD, p.93. It will be “responsible for developing the investment strategy for Equitas’ investment portfolio and for monitoring performance”: *ibid.*

⁴⁰ SOD, p.93. It will be “responsible for major policy decisions in relation to claims and settlements. It will review and approve major claims and commutations”: *ibid.*

⁴¹ SOD, p.93. It will be “responsible for ensuring sound financial management”: *ibid.*

⁴² SOD, p.93. It will “determine the terms of service of the executive directors and senior management”: *ibid.*

⁴³ SOD, p.93. It will be “responsible for recommending new board appointments”: *ibid.*

⁴⁴ See for example *The Re Report*, 97-14 (July 1997), p.1.

⁴⁵ Equitas Holdings RA 1996, p.2 (Chairman’s Statement). And see recently for example Mealey’s Seminar Friday 16th November 2001 — Presentation By Scott Moser Equitas Claims Director at *Mealey’s Litigation Report: Insurance*, December 11, 2001, p.27 at p.27-28 (“Equitas is a reinsurance company. ... We are an independent entity and not part of Lloyd’s. Lloyd’s has no ownership interest in Equitas, and we are wholly outside the Lloyd’s regulatory system”). No mention is made of the Corporation’s ownership of the Deferred Share in Equitas Holdings or the Lloyd’s Director on Equitas Holdings’ board.

⁴⁶ See p.20.

⁴⁷ See p.22.

⁴⁸ See Appendix 2.1.

⁴⁹ See Appendix 2.2.

⁵⁰ See for example LATD, §§4.2(A), (C), (D); 5.3, 5.4.

⁵¹ See for example LATD, §§4.2(E), (F); 5.3, 16, 18.1, 18.2.

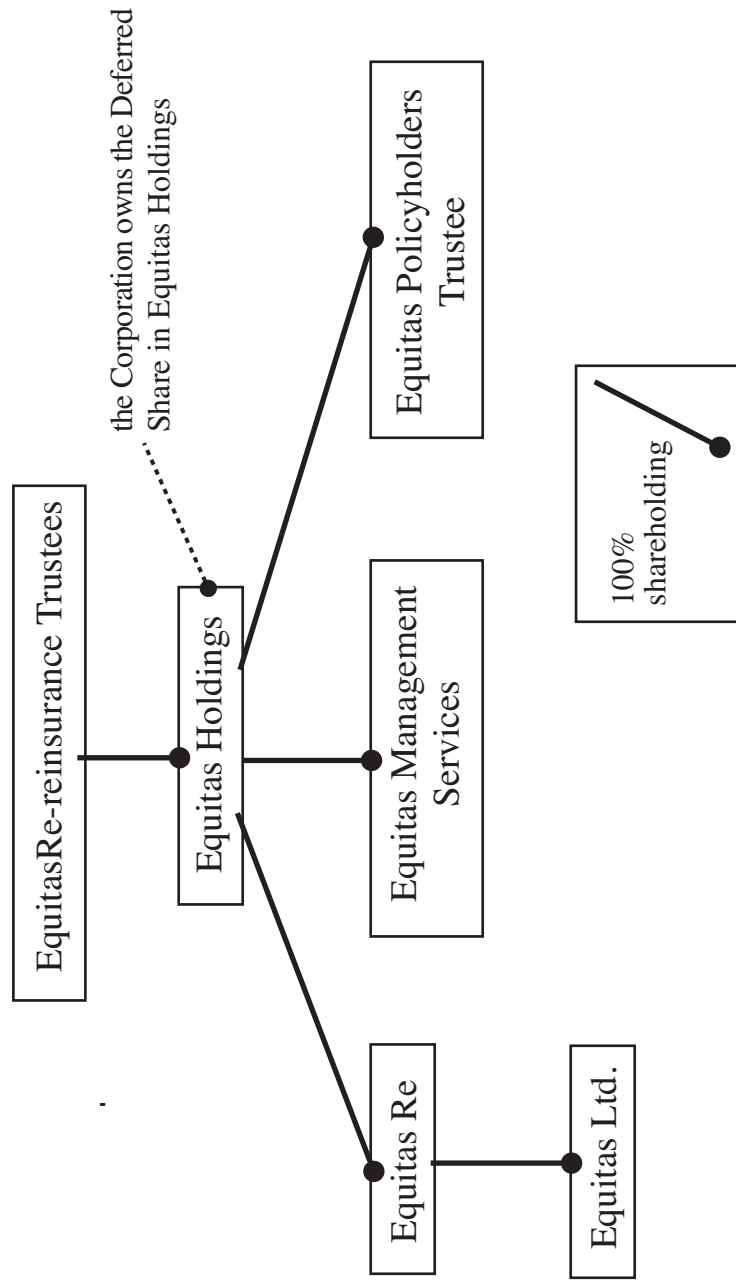
⁵² See p.A172.

⁵³ See p.139.

⁵⁴ Equitas Holdings RA fpe September 4, 1996, p.9 (Chief Executive Officer’s Review). “The panel is composed of representatives from various segments of the London insurance market, who meet periodically to discuss common concerns and potential problems”: *ibid.*

⁵⁵ SOD, p.81.

the Equitas enterprise



some relevant instruments: parties

RRC / trust deed	Equitas Re	Equitas Ltd.	Equitas P holders Trustee	EquitasRe-insurance Trustees	Equitas Holdings	other trustees	EquitasRe-insured SYA participants	others
RRC 1	Equitas Re as settling party on behalf of itself and all others in the “Equitas Group”					yes but not relevant	if RRC 1 “Accepting Names”	various
RRC 4	as RRC 4, §3 reinsurer and <i>ibid.</i> , §9 run-off agent	in order to bind to undertakings	as RRC 4, §4 assignee of various rights	no	no	no	as RRC 4, §3 cedants and <i>ibid.</i> , §9 principals	(1) Corporation (2) AUA 9 (3) AUA 10 (4) Closed Year Names
RRC 5	r-cedant	r-cessionaire	no	no	no	no	no	no
RRC 7	is bound	no	yes	no	no	no	no	no
RRC 17	no	yes	no	yes	yes	no	no	Corporation
EATD	as grantor	as grantor	no	no	no	EATD trustee (presently Brown Brothers Harriman Trust Co.)	no	LATD trustee (presently Citibank NA)
LATD	no	no	no	no	no	LATD trustee (presently Citibank NA)	to the extent a LATD “Name”	(1) Corporation (2) relevant managing agencies
Lloyd’s US SL CU TD	no	no	no	no	no	trustee (presently Citibank NA)	to the extent a Grantor (Current Contributor) or Underwriter	(1) Corporation; (2) Grantors (Current Contributors) (3) Underwriters
Lloyd’s US CR CU TD	no	no	no	no	no	trustee (presently Citibank NA)	to the extent a Grantor (Current Contributor) or Underwriter	(1) Corporation; (2) Grantors (Current Contributors) (3) Underwriters

summary: R&R's six principal components

R&R component	effect generally	effect on Member / SYA participant
settlement (RRC 1)	stopped most actual and threatened litigation and arbitration by Members against members' and managing agencies, the Corporation, etc.	Member gave and received comprehensive releases
EquitasRe-reinsurance (RRC 4, Part I)	stopped infiltration of relevant SYA participants' insurance liabilities into the accounts of themselves and other SYA participants	EquitasRe-reinsured SYA participant paid EquitasRe-reinsurance premium but remains a conduit to relevant personal-use and common-use funds
retrocession by Equitas Re to Equitas Ltd. of RRC 4, Part I contractual liabilities (RRC 5)	transferred all EquitasRe-reinsured liabilities from Equitas Re to Equitas Ltd.	no direct effect
run-off by Equitas Re of all EquitasRe-reinsured liabilities (RRC 4, Part II) as agent of each EP	individual managing agencies redundant; their replacement, AUA 9, also redundant	Equitas Re responsible directly to EP
delegation by Equitas Re to Equitas Ltd. of Equitas Re's RRC 4, Part II contractual functions (RRC 5)	transferred run-off of all EquitasRe-reinsured liabilities from Equitas Re to Equitas Ltd.	no direct effect
Proportionate Cover Plan (Equitas Re) and Retrocession Plan (Equitas Ltd.)	purports to be a valid contractual debt-quantum-reduction device	no direct effect: each EP still fully liable to EquitasRe-assured-at-Lloyd's

R&R**generally**

- 1.4 R&R⁵⁶ was a cooperative effort on various levels between self-regulators-at-Lloyd's, relevant members' and managing agencies, Members,⁵⁷ Lloyd's brokers, UK⁵⁸ and US⁵⁹ external insurance regulators, and US state securities regulators.⁶⁰ A "phenomenal event"⁶¹ (apparently considered by NYID as bespeaking financial strength⁶²), R&R was devised and implemented of dire necessity in order to accomplish certain matters of urgent back-office importance, viz. (among other things⁶³), to provide to EquitasRe-reinsured SYA participants "affordable 'finality' and an end to litigation";⁶⁴ to erect (apparently contrary to how the Lloyd's enterprise operates and is required regulatorily to operate) a "ringfence"⁶⁵ between EquitasRe-reinsured liabilities and continuing Members; and apparently to enable the Council to avoid having to ascertain, maintain and use a Central Fund sufficient to pay those liabilities. Attaining those four objectives was and continues to be the key to preserving the Lloyd's enterprise from overt financial collapse⁶⁶ caused not⁶⁷ by ordinary insurance losses but by chronic, and allegedly well concealed,⁶⁸ self-

⁵⁶ Cases include *Garrow v Lloyd's* [2000] Lloyd's Rep IR 38 (CA); [1999] Lloyd's Rep IR 482 (Jacob J); *McAllister v Lloyd's* [1999] Lloyd's Rep IR 487 (Carnwath J); *Manning v Lloyd's* [1998] Lloyd's Rep IR 186 (Mance J); *Lloyd's v Jaffray* {1} [1999] Lloyd's Rep IR 182 (Colman J); *Lloyd's v Leighs* [1997] CLC 1398 (CA); [1997] CLC 759 (Colman J); [1997] CLC 1012 (Colman J); *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA); [1998] CLC 127 (Tuckey J); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996), *mandamus denied sub nom. In re Allen*, 138 L. Ed. 2d 1004, 117 S. Ct. 2497 (1997); *Norwich Union Life Insurance Society v Qureshi* [2000] Lloyd's Rep IR 1 (CA). "Reconstruction & Renewal" is a coinage of the Lloyd's enterprise: see for example *R&R I*. And see the introductory note to this Edition, Appendix 1.1.

⁵⁷ See p.A41 *et seq.*

⁵⁸ See p.A9.

⁵⁹ See p.A8.

⁶⁰ See NASAA Agreement, State Agreement; and the summary at *SOD*, the Corporation's then CEO's July 26, 1996 cover letter, p.v.

⁶¹ Professor Sydney M. Cone III, *New York Law School Center for International Law Symposium — Implications of the Reconstruction of Lloyd's of London*, November 6, 1996 (www.nyls.edu/CIL/lloyds.htm, July 25, 2001), p.2 of 28 ("[T]he reconstruction of Lloyd's of London is a phenomenal event. ... It is really one of the epochal events of our time").

⁶² NYID press release, December 2, 1997("NY department to allow Lloyd's of London's surplus lines business to be funded at 50% of gross liabilities"):-

Superintendent of Insurance Neil D. Levin today announced that Lloyd's of London's U.S. surplus lines business will be funded at 50% of gross liabilities effective December 31, 1997. This will apply to all surplus lines business funded by the Lloyd's United States situs surplus lines trust funds and written on or after August 1, 1995. As part of this agreement with the Insurance Department, Lloyd's will also increase the funding of the Lloyd's American Surplus Joint Asset Trust Fund from \$100 million to \$200 million, effective January 1, 1998. Under a 1995 agreement with the Insurance Department, Lloyd's had been funding its surplus lines business at 100% of gross liabilities. After meeting in London with Lloyd's and Equitas officials, as well as members of the British Department of Trade and Industry (DTI), the Department believes these are prudent steps based on the following factors: Lloyd's has demonstrated increasing financial strength through its R & R (Equitas) program

Contemporaneous audit reports of Equitas Re were heavily qualified. And see p.36.

⁶³ On R&R's particular objectives, see p.A5.

⁶⁴ *SOD*, the Corporation's then CEO's July 30, 1996 cover letter, p. vii.

⁶⁵ See generally *SOD*, p.149, etc.

⁶⁶ See for example *Manning v Lloyd's* [1998] Lloyd's Rep IR 186, 193 (Mance J: "Lloyd's points out that R&R was a very large exercise designed to resolve problems which threatened to bring about the collapse of Lloyd's ..."); State Agreement, third recital ("Whereas, in order to prevent the failure of the Lloyd's market, Lloyd's has negotiated and proposed a comprehensive program known as the Lloyd's Reconstruction & renewal plan"). And see *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156, 161 (Hobhouse LJ).

⁶⁷ See for example the multiple mis-characterisation at *Corporate Participation 1997*, §2.5 (p.17):-

Names found themselves locked into loss making open years on which they continued to be exposed to deterioration in the results. These circumstances gave rise to much litigation within the market as Names sought to resolve their financial liabilities through the courts.

⁶⁸ Considerable evidence to that effect was deployed for the defendants-counterclaimants in the action judgment in which is at *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J, who found against the counterclaimants; the Court of Appeal dismissed their appeal on July 26, 2002).

regulatory⁶⁹ and professional⁷⁰ failures, all presided over by Members themselves evincing minimal interest in the enterprise's governance. RRC 1 (voluntary;⁷¹ there have been relatively few refuseniks⁷²) and RRC 4 (compulsory⁷³) particularly attempted to make financial provision, on various levels, for chronically under-reserved APH liabilities — controversially acquired, transmitted, managed, monitored and disclosed — which had been routinely infiltrated into the accounts of apparently largely uninformed and unsuspecting (and often financially eviscerated⁷⁴) conventionally inward-RTCing⁷⁵ SYA participants by their inadequately supervised⁷⁶ managing (and complicitous members') agencies.⁷⁷

⁶⁹ On self-regulatory failure leading to the financial crisis allayed by R&R, see for example *Treasury Sel. Comm. 1, passim*. External insurance regulatory failure — viz., the Treasury's alleged failure to discharge its First Non-Life Insurance directive (73/239/EEC), Art. 13(2) solvency supervisory functions — is currently the focus of European Commission's EEC Treaty, Art. 226 infringement proceedings following various Members' European Parliament Rules of Procedure r.174 petitions (see also EEC Treaty, Art. 194) to the European Parliament: see for example European Commission press release IP/01/1880 (December 20, 2001; "Insurance: commission seeks information from UK on regulation and supervision of Lloyd's"). And see Europarl January 24, 2002 news report ("Cult of secrecy hampers inquiry into Lloyd's of London"). *Ibid.*:-

During the debate following the statement by the Commission representative, Members of the [European Parliament's] Petitions Committee stressed that the 'obsessive secrecy' displayed in this matter would benefit nobody and certainly 'not Lloyd's, which is likely to be the subject of serious suspicions for a long time, whether these are justified or not'. MEPs were also astonished that the complaints received related to incidents going back 20 years in some cases and that the Commission had known nothing about them. ... In the case of Lloyd's, the matter had been rendered particularly difficult by the complexity encountered at all levels: internal rules and *modus operandi* of the company, the nature of the problems raised by the investigation, and the nature and procedures of the audit.

Note the misapprehension that the Lloyd's enterprise is a company. Cf. the Corporation's CEO quoted in *The Sunday Times*, April 14, 2002, *Business*, p.7 ("Footing the bill in a high-risk world" — "Lloyd's has been a closed world to the outside for too long and we have to make ourselves easy to understand, transparent and have our business practices in line with or ahead of the rest of the industry").

⁷⁰ See for example *Treasury Sel. Comm. 1*, §63:-

[I]f the long tail losses that continue to hit the market had been adequately reserved for, then the whole Equitas project would be unnecessary. The need for Equitas is therefore a grave indictment of the quality of decisions in the market over a period of years, and reflects a system of regulation that has allowed the current crisis at Lloyd's to develop. Although Lloyd's may seek to blame the companies employing individuals who made the decisions in the market, the ultimate responsibility for the problems lies with Lloyd's itself.

And see *ibid.*, §63-64 (p.xxv):-

A rigorous system of market regulation, requiring better standards of professionalism, regardless of the systems put in place by individual firms, would surely have helped prevent the current problems at Lloyd's. This legacy of the past means that instead of concentrating on building a successful business for the future, the current management of Lloyd's are forced to spend a vast amount of time and effort on schemes like Equitas, which are essentially actions to shore up an institution reeling from past failings. ... [T]he very benefits of the [Equitas] plan so robustly defended by Mr Middleton [the Corporation's then CEO] in evidence to the Committee form an impressive list of criticisms of the whole system under which the Lloyd's market operates, particularly the structure of syndicates and the annual nature of the syndicate venture. The case for Equitas is also the case for reforming the whole of the Lloyd's market in a change that would extend well beyond the structure of supervision and regulation. This raises the question of whether there are fundamental flaws with the Lloyd's market — in terms of its very structure — that any amount of regulatory adjustment will be unable to solve. Furthermore, there are many factors influencing the Lloyd's market at this time — with efforts to ensure the survival of the market not least among them. The various processes in train will crystallise over different time scales and these contingencies cloud the exact nature of the entity to be regulated in future.

And see *S&M*, §38 (p.13): "Lloyd's is a famous, long-established British institution which appears to have been brought close to collapse by its own failings."

⁷¹ See p.A9.

⁷² For example the appellant defendant-counterclaimants in *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J). The appeal hearing ended March 27, 2002.

⁷³ See p.A30.

⁷⁴ See recently for example Scott Moser, Equitas Claims Director at *Mealey's Litigation Report: Insurance*, December 11, 2001, p.27, 27:-

Equitas was created in the heat of the massive losses suffered by Lloyd's in the late 1980's and early 1990's. It was a time of financial ruin — and worse — for some Lloyd's Names. It was a time of doubt about whether Lloyd's could survive. Lloyd's rose from the ashes in 1996 through a comprehensive Reconstruction and Renewal Program. The cornerstone of that program was Equitas.

⁷⁵ The pre-R&R financial and legal predicaments of relevant SYA participants brought to the attention of previously somnolent Members the extreme dangers of conventional inward-RTC, the self-regulatory failure in permitting it, the self-regulatory failure in permitting managing agencies to effect it, members' agencies' apparent toleration of it, the notion of being able to decline to sell it, and the urgent need, closely associated with all of the foregoing, to permanently escape from the Lloyd's enterprise. On conventional RTC, see p.207.

principal components

- 1.5 R&R's principal components include: (1) Equitas Re's RRC 4,⁷⁸ §3, government-approved⁷⁹ 100% reinsurance⁸⁰ of the "1992 and Prior Business"⁸¹ of Members in their capacity as participants on designated⁸² SYAs, viz., those which budded (for the most part) in or before the 1992 UY, by each such SYA participant compulsorily⁸³ entering into RRC 4, therein called a "Name".⁸⁴ Calculating the RRC 4, §3 reinsurance premium⁸⁵ was a major undertaking.⁸⁶ R&R's EquitasRe-reinsurance component directly spawned (for example) relevant bodies (such as EquitasRe-reinsurance Trustees, Equitas Holdings, Equitas Re, Equitas Ltd., Equitas Policyholders Trustee, Equitas Management Services; and relevant instruments (such as RRCs 4, 5, 7, 17 and the EATD). Apparently attractive to US state insurance regulators when considering whether to approve relevant R&R arrangements was the marshalling and supplementation of reserves which might not otherwise have been available conventionally at Lloyd's; (2) Equitas Re's RRC 5, §2, 100% retrocession to Equitas Ltd. of its RRC 4, §3 obligations;⁸⁷ (3) each EquitasRe-reinsured SYA participant's RRC 4, §9 compulsory irrevocable appointment of Equitas Re as his exclusive agent to merely run-off the RRC 4, §3-reinsured liabilities. Equitas Re's (to some extent conflicting) reinsurance-as-principal and run-off-agency functions are sometimes confused;⁸⁸ (4) Equitas Re's RRC 5, §5, 100% delegation to Equitas Ltd. of Equitas Re's RRC 4, §9 run-off agency functions;⁸⁹ (5) various contractual devices, at RRC 4, Sch. 3 and RRC 5, Sch. 3 respectively, seeking to entitle Equitas Re and Equitas Ltd. in certain circumstances to unilaterally reduce to an unspecified figure, of each's respective choice, their respective reinsurance and retrocession obligations;⁹⁰ (6) various material assignments by the EquitasRe-reinsured SYA participant. For example, rather than retain any rights against his own existing outward reinsurers, each EquitasRe-reinsured SYA participant has assigned⁹¹ those rights to Equitas Re. And rather than retain any rights of recovery against Equitas Re for non-performance of its reinsurance obligations, each EquitasRe-reinsured SYA participant has assigned⁹² those rights to Equitas Policyholders Trustee; (7) a comprehensive settlement — on the terms of RRC 1⁹³ and (where relevant) RRC 2 — of EquitasRe-reinsured SYA participants' complaints against a wide range of actual and potential defendants, with correspondingly wide releases of (among others) such EquitasRe-reinsured SYA participants as ceased to be Members.

⁷⁶ *Treasury Sel. Comm. 1*, §54 criticised the Lloyd's Regulatory Board's then chairman for apparently evading questions concerning fraudulent concealment of asbestos-related financial exposure, and observed that "the prudential supervision of the market, in which a range of management and market information will be produced could have helped prevent the spread of long-tail risks throughout the market".

⁷⁷ See for example *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265 (Cresswell J).

⁷⁸ See Appendix 1.2.

⁷⁹ See p.A37.

⁸⁰ See generally RRC 4, §3.

⁸¹ See the RRC 4, Sch. 2, §1 definition.

⁸² At RRC 4, Sch. 1.

⁸³ As noted at, for example, RRC 4, §3.11(a).

⁸⁴ RRC 4, parties and *ibid.*, Sch. 2, §1 definition of "Name" *simpliciter*.

⁸⁵ See generally RRC 4, §§5-6 and *ibid.*, Sch. 4.

⁸⁶ See p.29.

⁸⁷ See generally *SOD*, p.99 ("Equitas Reinsurance will cede all the business reinsured by it to Equitas Limited under the Retrocession Agreement [RRC 5] for a premium, which, combined with the contribution from Equitas Reinsurance to Equitas Limited ...; will equal the aggregate of the Equitas premium and the premiums received for other liabilities").

⁸⁸ See p.45.

⁸⁹ See generally *SOD*, p.99 ("Under the Retrocession Agreement [RRC 5], the run-off of the reinsured business ... will be delegated to Equitas Limited").

⁹⁰ See Chapter 4, Sub-chapter 3.

⁹¹ At RRC 4, §6.1.

⁹² At RRC 4, §4.

⁹³ See Appendix 1.1.

rights and remedies vs, and supervision of, the Equitas entities

entity etc.	EP representation			EquitasRe-assured-at-Lloyd's representation			external insurance regulators	Member not an EP	
	board	general meetings		board	general meetings			board	general meetings
Equitas Re	no	no		no	no		FSA: ordinary insurance law; ordinary company law; ordinary insolvency law	no	no
Equitas Ltd.	no	no		no	no			no	no
Equitas Holdings	no	no		no	no		DTI: ordinary company law; ordinary insolvency law	no	no
Equitas Policyholders Trustee	no	no		no	no			no	no
EquitasRe-reinsurance Trustees	yes	-		no	no		ordinary law of trusts	no	-
Council of Lloyd's	election if still a Member	-		no	-		FSA: Financial Services and Markets Act 2000, Part XIX and rules made thereunder	election	-
Lloyd's	-	yes if still a Member		-	yes if still a Member			-	yes

summary: the EquitasRe-assured's-at-Lloyd's place in the Equitas Re scheme

RRC	contractual configuration, relationship	expressly excluded as a third-party beneficiary?	payee absent formal insolvency?	payee in a RRC 7, §2.15 insolvency?	payee in proportionate cover?
RRC 4	(1) the EquitasRe-assured-at-Lloyd's ("Insurance Creditor") is not a contracting party; (2) EquitasRe-reinsured SYA participant is expressly excluded as a payee (§9.4(c)); (3) Equitas Re is required ordinarily to make payments direct to the EquitasRe-assured-at-Lloyd's, etc.; see generally §3.4; (4) the EquitasRe-assured-at-Lloyd's appears to be under no contractual or other obligation to treat or settle with Equitas Re (whether solvent, purportedly solvent (<i>viz.</i> , Sch. 3 proportionate cover) or formally insolvent, or accept any RRC 7, §3.4 payment at any pay-out rate	yes: §3.7	yes: §3.4	no: in an insolvency, see RRC 7, §2.4 etc.	yes: Sch. 3, §6
RRC 5	(1) the EquitasRe-assured-at-Lloyd's ("Insurance Creditor") is not a contracting party; (2) Equitas Ltd.'s contractual obligations and functions are principally directed towards Equitas Re	yes: §2.6	no	no	no
RRC 7	(1) the EquitasRe-assured-at-Lloyd's ("Insurance Creditor") has no contractual relationship with Equitas Policyholders Trustee; (2) the EquitasRe-assured-at-Lloyd's appears to be under no contractual or other obligation to treat or settle with Equitas Policyholders Trustee or accept any RRC 7, §2.7(b) payment	no: see §2.7(b)	yes: §2.7(b) after §2.15 insolvency of Equitas Re	no: §2.15(c)(i)	

the EquitasRe-assured-at-Lloyd's not a R&R contracting party, yet somewhat directly affected

- 1.6 As evidenced by (for example) the list of parties to RRCs 1 and 4, R&R contractually acted directly and personally throughout the Lloyd's enterprise — including on (for example) self-regulators-at-Lloyd's, the Corporation, Members⁹⁴ (as such and as SYA participants), members' agencies, managing agencies, Lloyd's brokers, SYA participants' auditors, and external regulators such as the DTI and US state securities commissioners⁹⁵ — but apparently not on any assured-at-Lloyd's. For example: (1) self-regulators-at-Lloyd's asseverate⁹⁶ that the Equitas enterprise has no connection whatever with the Lloyd's enterprise; (2) the EquitasRe-assured-at-Lloyd's is not a party to any R&R contract, is purportedly expressly⁹⁷ excluded (*SOD* “policyholder protection” indications⁹⁸ notwithstanding) from being granted by a court any statutory⁹⁹ or common law third-party-beneficiary relief in relation to RRCs 4 and 5, and is purportedly wholly subordinated in certain circumstances to RRC 4-defined General Creditors;¹⁰⁰ (3) self-regulators-at-Lloyd's — despite various apparently inconsistent back-office measures such as (for example) the New Central Fund Byelaw¹⁰¹ — have not resiled from, and continue to make, representations to all actual and potential assureds-at-Lloyd's as a class that every claim on a valid “Lloyd's policy” will be payable 100% at Lloyd's regardless of such extrinsia as any SYA participant's outward reinsurance; (4) neither self-regulators-at-Lloyd's nor any other person or body is believed to have given any notice of any actually or potentially reduced claims payment to, or to have called for claims from (or otherwise to have interacted¹⁰² with) any EquitasRe-assured-at-Lloyd's — which notice would probably have threatened the Lloyd's enterprise's continuing viability and precipitated considerable controversy. It appears to follow that nothing about R&R affects the EquitasRe-assured's-at-Lloyd's ordinary recourse to relevant common-use funds at and components of the Lloyd's enterprise. This is not to say that the EquitasRe-assured-at-Lloyd's is not directly and materially affected by R&R. For example, his claim is channelled (including by his own Lloyd's broker) to, and dealt with by, Equitas Re:¹⁰³ Equitas Re may have its own views as to how much of a valid claim it wishes to pay; the Lloyd's enterprise provides no agent, other recipient or formal procedure to process his claim anywhere within the Lloyd's enterprise; and the Council does purport to disentitle him to have any part of his claim paid by the Central Fund absent consent of Members in Corporation general meeting.

⁹⁴ See *SOD*, the then Chairman of Lloyd's July 30, 1996 cover letter, p.i (“I am well aware that the plan does not provide everything that members might wish. We have done our best to make the settlement offer as attractive as possible, but the *reconstruction plan* is necessarily based upon consent — the consent of *members* and the consent of *contributors* to the offer”; and see *ibid.*: “the very real benefits which the settlement offer provides to *members*”; italics added).

⁹⁵ See the State Agreement and NASAA Agreement.

⁹⁶ See p.5.

⁹⁷ See for example RRC 4, §3.7 (severable: see *ibid.*, §21); RRC 5, §2.6 (severable: see *ibid.*, §10).

⁹⁸ See for example *SOD*, p.138 (“The Council has a clear statutory duty to protect policyholder interests...” — there appears to be no such duty, including anywhere in Lloyd's Acts 1871-1982).

⁹⁹ If Contracts (Rights of Third Parties) Act 1999 did apply to contracts entered into on September 3, 1996 — which it does not because of the (May 11, 1999) commencement provision at *ibid.*, s.10(2) — RRC 4, §3.7 and RRC 5, §2.6 might be effective to exclude the EquitasRe-assured-at-Lloyd's from third party beneficiary status: see *op. cit.*, s.1(2).

¹⁰⁰ As at RRC 4, Sch. 3, §12.

¹⁰¹ See p.127.

¹⁰² Cf. *SOD*, the then Chairman of Lloyd's July 30, 1996 cover letter, p.i referring to “more than a year of discussion and negotiation with all sections of the Society”.

¹⁰³ See p.72.

EQUITASRE-REINSURANCE TRUSTEES**orientation****generally**

- 1.7 At the Equitas enterprise's theoretical apex are the (presently seven) unincorporated EquitasRe-reinsurance Trustees¹⁰⁴ (not to be confused with Equitas Policyholders Trustee¹⁰⁵), who act further and subject to RRC 17¹⁰⁶ and (to the extent relevant) Equitas Holdings' Articles of Association. The RRC 17-governed EquitasRe-reinsurance "Trust Property"¹⁰⁷ consists of £10 plus the two ordinary shares in Equitas Holdings — the Corporation owns Equitas Holdings' one Deferred Share¹⁰⁸ — plus all property at any time added thereto by way of further settlement.¹⁰⁹ The EquitasRe-reinsurance Trustees jointly thus own the entire Equitas group of companies, *viz.*, all of Equitas Holdings' 100% corporate holdings including Equitas Re (and the latter's 100% corporate holding, Equitas Ltd.) and Equitas Policyholders Trustee. RRC 17 prohibits¹¹⁰ the EquitasRe-reinsurance Trustees from selling or otherwise disposing of any interest in those shares. The capital and income of any RRC 17 Trust Property, including any realised monetary value of any Equitas group company, are thus diverted away from EquitasRe-reinsured SYA participants. The Trust Period is eighty years less one day from RRC 17's date, or such earlier date as the EquitasRe-reinsurance Trustees declare by deed,¹¹¹ during which the trust's income must be held for charitable causes¹¹² (and can be accumulated¹¹³). As at the end of the Trust Period, both capital and income must be held for charitable causes generally.¹¹⁴

numbers; tenure

- 1.8 The number of EquitasRe-reinsurance Trustees is limited in RRC 17 to a maximum of seven¹¹⁵ and a minimum of four.¹¹⁶ They retire in rotation¹¹⁷ or on reaching 72.¹¹⁸ All current or former Members,¹¹⁹ each of the original seven trustees was occultly¹²⁰ appointed rather than elected.¹²¹

¹⁰⁴ See recently for example Equitas Holdings RA fye March 3,1 2002, pp.28, 32-33. See the summary at *SOD*, p.9[4-97]. Historically, see for example the then Chairman of Lloyd's April 26, 1996 letter to Ambassador C.H. Bruggmann, p.1:-

In the October R&R Progress Report, Lloyd's outlined the Equitas governance structure. The decision to opt for a trust arrangement rather than issuing shares directly to the Names reinsuring into Equitas was taken after a thorough evaluation of both options. The regulatory, tax and securities law issues in the UK, USA and other jurisdictions made this arrangement more viable.

¹⁰⁵ See p.40.

¹⁰⁶ See Appendix 1.5.

¹⁰⁷ See RRC 17, §1.1 (definition of "Trust Property"). *Cf.* RRC 7, §1.1 "Trust Property".

¹⁰⁸ See p.20.

¹⁰⁹ RRC 17, §1.1, definition of "Trust Property".

¹¹⁰ RRC 17, §4.1; and see *SOD*, p.96. And Equitas Holdings is prohibited by its articles from registering a transfer of shares other than to an EquitasRe-reinsurance Trustee: see p.20.

¹¹¹ RRC 17, §1.1.

¹¹² See RRC 17, §3.1.

¹¹³ See RRC 17, §3.2.

¹¹⁴ See RRC 17, §3.3.

¹¹⁵ RRC 17, §9.9.

¹¹⁶ RRC 17, §9.8(b).

¹¹⁷ See for example RRC 17, §9.2-§9.3.

¹¹⁸ See for example RRC 17, §1(b) and *ibid.*, §9.6.

¹¹⁹ Listed in RRC 17, parties.

¹²⁰ *SOD*, July 30, 1996 cover letter from the Corporation's then CEO, p.iv (per *SOD*, p.93, the original seven were "invited"). They are listed at *SOD*, p.93-94.

¹²¹ *SOD*, July 30, 1996 cover letter from the Corporation's then CEO, p.iv:-

The Settlement Information Document [R&R 10] alerted Names to the possibility that developments in the United States might affect the proposal to allow Names to elect the trustees who will hold the share capital of Equitas under the terms of the Equitas Trust, which is being established to ensure that the interests of Names, as reinsureds, are properly safeguarded. Despite the conclusion of the negotiations with certain of the state securities regulators which culminated in the State Agreement referred to below, and the fact that Lloyd's is confident that the Equitas RITC does not involve the issue of a security within

Existing trustees can be removed¹²² and new ones appointed.¹²³ Appointing a new trustee requires the unanimous consent of the existing trustees.¹²⁴

beneficiaries and beneficencees

- 1.9 The RRC 17 beneficiaries are specific RRC 17, Sch. 2 charities¹²⁵ or other purely charitable bodies.¹²⁶ Although RRC 17 confers on no EquitasRe-reinsured SYA participant any beneficiary status or other right to receive any Trust Property capital or income,¹²⁷ the EquitasRe-reinsurance Trustees are required during the trust period¹²⁸ to exercise all relevant rights and powers “[n]otwithstanding and in priority to the trusts declared in clause 3 ... with a view to protecting and furthering the interests of the Names as a whole in their capacity as reinsureds or potential reinsureds under the Reinsurance Contract including their interest in receiving a return premium in accordance with the terms thereof”.¹²⁹ The trustees have described their functions accordingly.¹³⁰ The trustees support Equitas Re’s objectives of delivering “true finality”, and of generating and distributing a surplus to EquitasRe-reinsured SYA participants,¹³¹ to which extent their functions are consistent with Equitas Policyholders Trustee’s RRC 7, §2.7(d) distribution obligations. The trust arrangement is meant to act as a source of comfort to EquitasRe-reinsured SYA participants that Equitas Re (*cf.* Equitas Policyholders Trustee, which is required to perform corresponding functions principally for the benefit of EquitasRe-assureds-at-Lloyd’s) will properly advance their interests.¹³² Such rights as each EquitasRe-reinsured SYA participant has against the trustees are personal to him, and not assignable or otherwise transferable.¹³³ The

the United States, Lloyd’s has been advised that the election of the Equitas trustees by Names would provide opponents of the settlement offer with assistance in arguing that the Equitas arrangements constitute a security.

- 122 See for example RRC 17, §9.5 and *ibid.*, §9.7.
- 123 See for example RRC 17, §9.4(a) (appointment only if acceptable as “fit and proper” to UK insurance regulators); and see *SOD*, p.93. On “fit and proper”, see for example FSA The Fit and Proper Test for Approved Persons (made June 21, 2001; in effect from September 3, 2001) (“FIT”).
- 124 RRC 17, §9.8(a); and see *SOD*, p.95.
- 125 See RRC 17, §3; *ibid.*, §1.1 (definition of “Discretionary Class”) and *ibid.*, Sch. 2 (“The Discretionary Class”).
- 126 See generally RRC 17, §3.3.
- 127 RRC 17, §2.4.
- 128 See RRC 17, §1.1 (definition of “Trust Period”).
- 129 RRC 17, §2.1. And see *ibid.*, §§1.1 and 2.2. “[A]s a whole” is infelicitous: *per* Lloyd’s Act 1982, s.8(1), each EquitasRe-reinsured SYA participant sustains financial adversity in relation to his own particular insurance business individually, not collectively. Equitas Re agglomerates EquitasRe-reinsured SYA participants’ individual Equitas premiums without pooling their liabilities: see p.81.
- 130 June 12, 1998 letter to EquitasRe-reinsured SYA participants from the then chairman of the seven EquitasRe-reinsurance Trustees, p.1.
- 131 June 12, 1998 letter from EquitasRe-reinsurance Trustees to EquitasRe-reinsured SYA participants, p.3:-
The Trustees fully endorse the two key objectives of Equitas: to deliver true finality and, in time, to create sufficient surplus to allow some return of premium to be made to Reinsured Names. It must, however, be recognised that no return of premium can be expected for quite some time, if ever. The uncertainties will have to be greatly reduced and the regulators satisfied before such matters can begin to be addressed. So any talk of a return premium ... is premature and extremely speculative.
- 132 See *S&M*, p.20:-
53. ...[W]e hold the view that the Board of Directors of Equitas should be answerable, directly or indirectly to Names. ... 54. If procedures can be put in place for the election of Directors of Equitas which convince Names that the Directors will ultimately be answerable to them, Names’ anxieties about the future conduct of the business of Equitas should be substantially allayed.
- 133 RRC 17, §4.3. As to the value of those rights, see for example *SOD*, p.95:-
It should ... be noted that in view of the prohibition in the Articles of Association of Equitas Holdings on payment of any dividends or other distributions and the return premium mechanism under the Reinsurance Contract, it is most unlikely that any significant income will arise in respect of the ordinary shares or that the capital value attaching to such shares will amount to any significant value.
And see *SOD*, p.96:-
The Trustees owe fiduciary duties to the Names as reinsureds and to the discretionary class of charitable beneficiaries and other worthy causes in respect of the trusts over income and income referred to above. Subject to these fiduciary duties, the Trustees have absolute discretion as to how to exercise their rights, powers and discretions under the Trust Deed.
Cf. RRC 17, §8.1(d) (EquitasRe-reinsurance Trustees owe no fiduciary duties to Equitas Holdings, etc.).

trustees are not liable for failing to act at the request or direction of any EquitasRe-reinsured SYA participant.¹³⁴

activities

internal and external voting

- 1.10** The quorum for internal meetings¹³⁵ is generally four EquitasRe-reinsurance Trustees.¹³⁶ A resolution of the EquitasRe-reinsurance Trustees must generally be passed by at least two-thirds of such trustees as happen to be present and vote, subject to a minimum of four votes in favour.¹³⁷ The chairman has no casting vote. A quorum of four EquitasRe-reinsurance Trustees is empowered to adopt resolutions in writing rather than by meeting.¹³⁸ The EquitasRe-reinsurance Trustees are required to appoint a chairman, who chairs meetings, liaises with Equitas Holdings, and acts as the EquitasRe-reinsurance Trustees' "general spokesman".¹³⁹ Their joint ownership of Equitas Holdings' two ordinary shares means that the EquitasRe-reinsurance Trustees are in effect one person for some formal decision-making purposes in relation to third parties. For example, so far as concerns voting at Equitas Holdings' general meetings (the conduct of which is set out in Equitas Holdings' Articles of Association¹⁴⁰) the company's only voting member, in relation to both such shares, is the same only one trustee to the exclusion of any votes purportedly cast by any of the other trustees.¹⁴¹ If there are less than four EquitasRe-reinsurance Trustees in office, the remaining trustees are empowered to resolve at an Equitas Holdings general meeting only to re-elect a director retiring by rotation or to reappoint an auditor offering itself for re-election.¹⁴²

generally; some particular functions and powers

- 1.11** RRC 17 confers on the EquitasRe-reinsurance Trustees particular express powers, such as the power to (for example¹⁴³) appoint experts,¹⁴⁴ agents¹⁴⁵ and delegates,¹⁴⁶ and seek legal or other expert advice before taking any action under RRC 17.¹⁴⁷ The EquitasRe-reinsurance Trustees are empowered to consent to any scheme or composition under Companies Act 1985, s.425 or voluntary arrangement under Insolvency Act 1986, s.1-8 in relation to Equitas Holdings or any subsidiary.¹⁴⁸ The fully indemnified¹⁴⁹ EquitasRe-reinsurance Trustees have a discretion on how to

¹³⁴ RRC 17, §4.2.

¹³⁵ See generally RRC 17, §8.2.

¹³⁶ RRC 17, §8.2(d), subject to *ibid.*, §§8.3 and 9.3.

¹³⁷ RRC 17, §8.2(c), subject to *ibid.*, §§8.3, 9.3 and 9.8; *SOD*, p.95.

¹³⁸ RRC 17, §8.2(g), except in the circumstances set out in *ibid.*, §8.3: *ibid.*

¹³⁹ RRC 17, §8.4(a); *SOD*, p.95.

¹⁴⁰ See Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §§25-59.

¹⁴¹ See p.24.

¹⁴² RRC 17, §8.3; *SOD*, p.95.

¹⁴³ See generally RRC 17, §8.1.

¹⁴⁴ RRC 17, §8.1(e).

¹⁴⁵ RRC 17, §8.1(g).

¹⁴⁶ RRC 17, §8.1(h).

¹⁴⁷ RRC 17, §8.1(e).

¹⁴⁸ RRC 17, §8.1(m).

¹⁴⁹ Equitas Holdings and Equitas Ltd. jointly and severally indemnify the EquitasRe-reinsurance Trustees (without prejudice to the latter's statutory rights to indemnity) in relation to the actual or purported execution of any RRC 17 functions vested in them: see the detailed provisions at RRC 17, §7.1-§7.3; and see *SOD*, p.96. Equitas Ltd. covenants to transfer a sum into a segregated deposit account (the interest to accrue to Equitas Ltd. prior to the security's enforcement) to securitise the indemnity obligation, and to execute a charge over that account in favour of the EquitasRe-reinsurance Trustees: RRC 17, §7.3; and see Equitas Holdings RA fpe September 4, 1996, p.18.

exercise their RRC 17 rights, powers and discretions.¹⁵⁰ They receive Equitas Holdings' annual report and accounts; appoint its auditors, and generally exercise all the normal functions, powers and rights of shareholders given to them by Equitas Holdings' Articles of Association.¹⁵¹ They report periodically to EquitasRe-reinsured SYA participants.¹⁵²

their supervision of Equitas Re

- 1.12 For its part, Equitas Holdings covenants and undertakes to provide to the EquitasRe-reinsurance Trustees (for example¹⁵³) basic information to which they are already entitled as shareholders,¹⁵⁴ plus notification of ceased or new directors¹⁵⁵ (which must in any event be publicly filed), and to consult with the EquitasRe-reinsurance Trustees before exercising a power to appoint or remove Equitas Holdings directors.¹⁵⁶ For its part, Equitas Ltd. agrees to consult with the trustees' chairman before implementing a RRC 5, Sch. 3 retrocession plan "to the extent reasonably practicable and subject to the duties of its directors to creditors and others".¹⁵⁷ The EquitasRe-reinsurance Trustees, consistently with their joint 100% ownership of Equitas Holdings, presumably have extensive formal and informal contacts with each Equitas group company,¹⁵⁸ especially Equitas Holdings, Equitas Re and (at the appropriate time) Equitas Policyholders Trustee. The EquitasRe-reinsurance Trustees' chairman is the "main channel of communication"¹⁵⁹ between the EquitasRe-reinsurance Trustees and the various "Equitas" boards.¹⁶⁰ The EquitasRe-reinsurance Trustees are not bound or required to interfere in the management or conduct of Equitas Holdings' or any of its subsidiaries' business absent actual notice of any "act of dishonesty or misappropriation by any directors or officers" of that company or of any subsidiary, "and it is understood and acknowledged that they will not in general do so".¹⁶¹ The EquitasRe-reinsurance Trustees appear to embrace¹⁶² such constraints, asserting (query consistently with their duty¹⁶³ to protect and further the interests of EquitasRe-reinsured SYA participants) that in exercising their functions they have a "strict duty" of confidentiality¹⁶⁴ and are "not back-seat drivers".¹⁶⁵

¹⁵⁰ See for example RRC 17, §4.2 and *ibid.*, §8.1. And see *SOD*, p.96.

¹⁵¹ See generally June 12, 1998 letter from EquitasRe-reinsurance Trustees to EquitasRe-reinsured SYA participants, p.1.

¹⁵² See for example June 12, 1998 letter to EquitasRe-reinsured SYA participants from the then chairman of the seven EquitasRe-reinsurance Trustees.

¹⁵³ See the full list at RRC 17, §5.1.

¹⁵⁴ RRC 17, §5.1(a).

¹⁵⁵ RRC 17, §5.1(e).

¹⁵⁶ RRC 17, §5.4.

¹⁵⁷ RRC 17, §5.5.

¹⁵⁸ *SOD*, p.95:-

It is expected that arrangements will be made for informal consultation between Equitas and the Equitas Trustees [EquitasRe-reinsurance Trustees] in addition to the more formal communications which a company normally has with its shareholders. In particular, the Equitas Trustees would be consulted if the implementation of proportionate cover were ever to arise under the Reinsurance Contract [RRC 4] and on the appointment of directors by the board.

¹⁵⁹ *SOD*, p.95.

¹⁶⁰ RRC 17, §8.4(a).

¹⁶¹ RRC 17, §4.2.

¹⁶² See for example June 12, 1998 letter to EquitasRe-reinsured SYA participants from the then chairman of the seven Equitas Trust trustees, p.2. *Ibid.*: "The relationship between the Equitas companies and the Trustees has proved to be constructive and workable".

¹⁶³ See RRC 17, §2.1.

¹⁶⁴ June 12, 1998 letter from EquitasRe-reinsurance Trustees to EquitasRe-reinsured SYA participants, p.2 ("Sometimes this will make it impossible for us to respond in any way to issues raised with us, even by Reinsured Names").

¹⁶⁵ June 12, 1998 letter from EquitasRe-reinsurance Trustees to EquitasRe-reinsured SYA participants, p.2 ("That said, like any controlling shareholders we are kept well informed about the activities and the plans of the Company"). *Cf.* for example *SOD*, p.94:-

The Equitas Trustees will have all the normal rights of shareholders, including the right to approve changes to the Articles of Association and to appoint and remove directors. Since it is a requirement that Equitas Holdings, Equitas Reinsurance and Equitas Limited have identical boards, the Equitas Trustees therefore have ... the power to determine the membership of the Equitas Reinsurance and Equitas Limited boards. The Equitas Trustees will also have the right to approve various matters

EQUITAS HOLDINGS

regulation

- 1.13 Like all other companies in the Equitas group, Equitas Holdings is incorporated in England and Wales; is subject to ordinary company law;¹⁶⁶ and its liability is said (highly misleadingly to those unfamiliar with the jargon) to be “limited by shares”. In reality, the relevant financial liability to the *company* of each *shareholder*¹⁶⁷ is limited to such (if any) of each of his share’s face price as remains unpaid by him to the company.¹⁶⁸ The company’s own assets and liabilities are a different matter.

principal object; accounts

- 1.14 Equitas Holdings’ principal formal object is to “co-ordinate, finance and manage all or any part of the operations of any company which is a subsidiary company of or otherwise under the control of the Company and generally to carry on the business of a holding company”.¹⁶⁹ It wholly owns all shares in Equitas Re¹⁷⁰ (and thus in Equitas Ltd.¹⁷¹), Equitas Policyholders Trustee, and Equitas Management Services. It itself is not intended to conduct any trading activities “directly”.¹⁷² Activities relating to insurance are not within its objects; unlike Equitas Re and Equitas Ltd., it is not a FSA-authorised insurance company. Its year-end is March 31.¹⁷³ Equitas

which are normally within the power of directors but which are, in this case, reserved under the proposed Articles of Association for the decision of shareholders.

¹⁶⁶ Statutory provisions include (for example) Companies Acts 1985-1989; Auditors (Financial Services Act 1986) Rules 1994, SI 1994/526; Banking Coordination (Second Council Directive) Regulations 1992, SI 1992/3218; Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996, SI 1996/253; Companies Act 1985 (Bank Accounts) Regulations 1994, SI 1994/233; Companies Act 1985 (Directors’ Report) (Statement of Payment Practice) Regulations 1997, SI 1997/571; Companies Act 1985 (Disclosure of Remuneration for Non-Audit Work) Regulations 1991, SI 1991/2128; Companies Act 1985 (Insurance Companies Accounts) Regulations 1993, SI 1993/3246; Companies Act 1985 (Miscellaneous Accounting Amendments) Regulations 1996, SI 1996/189; Companies Act 1989 (Register of Auditors and Information about Audit Firms) Regulations 1991, SI 1991/1566; Companies (Disclosure of Directors’ Interests) (Exceptions) Regulations 1985, SI 1985/802; Companies (Forms) (Amendment) Regulations 1987, SI 1987/752; Companies (Inspection and Copying of Registers, Indices and Documents) Regulations 1991, SI 1991/1998; Companies (Registers and other Records) Regulations 1985, SI 1985/724; Companies (Revision of Defective Accounts and Report) Regulations 1990, SI 1990/2570; Companies (Single Member Private Limited Companies) Regulations 1992, SI 1992/1699; Companies (Summary Financial Statement) Regulations 1995, SI 1995/2092; Companies (Tables A to F) Regulations 1985, SI 1985/805; Companies (Unfair Prejudice Applications) Proceedings Rules 1986, SI 1986/2000; Contracting Out (Functions in Relation to Insurance) Order 1998, SI 1998/2842; Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013; Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386; Department of Trade and Industry (Fees) Order 1988, SI 1988/93; Disclosure of Interests in Shares (Amendment) (No 2) Regulations 1993, SI 1993/2689 Disclosure of Interests in Shares (Amendment) Regulations 1993, SI 1993/1819; Financial Institutions (Prudential Supervision) Regulations 1996, SI 1996/1669; Financial Markets and Insolvency (Money Market) Regulations 1995, SI 1995/2049; Financial Markets and Insolvency Regulations 1991, SI 1991/880; Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979; Financial Markets and Insolvency Regulations 1996, SI 1996/1469; Insolvency Practitioners Regulations 1990, SI 1990/439; Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952; Insolvency Regulations 1994, SI 1994/2507; Insolvency Rules 1986, SI 1986/1925; Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023; Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909; Merger (Prenotification) Regulations 1990, SI 1990/501; Public Offers of Securities Regulations 1995, SI 1995/1537, etc.

¹⁶⁷ See Companies Act 1985, s.1(2)(a) (“a company having the liability of its *members* limited by the memorandum [of association] to the amount, if any, unpaid on the shares respectively held by them (“a company limited by shares”)”); italics added.

¹⁶⁸ Insolvency Act 1986, s.74(2)(d) (shareholder’s liability on winding up). And see Companies Act 1985, s.1(2)(a).

¹⁶⁹ Equitas Holdings’ December 5, 1995 Memorandum of Association, §3(a).

¹⁷⁰ See p.28.

¹⁷¹ See p.39.

¹⁷² *SOD*, p.82 (“It will not conduct any trading activities directly”). “[D]irectly” is presumably error for “itself”.

¹⁷³ Its first filed consolidated accounts covered the financial period December 5, 1995 to September 4, 1996; then to March 31, 1997; and annually to March 31 thereafter.

Holdings puts out periodic financial reports¹⁷⁴ and holds general meetings of EquitasRe-insured SYA participants.

share capital

summary; the two £50 ordinary shares

- 1.15 Equitas Holdings' authorised share capital (engineered to some extent to avoid US securities complications¹⁷⁵) is £101, in the form of two £50 ordinary shares¹⁷⁶ both issued to the EquitasRe-insurance Trustees¹⁷⁷ jointly,¹⁷⁸ to hold under the terms of RRC 17¹⁷⁹ and Equitas Holdings' Articles of Association,¹⁸⁰ and one £1 so-called "Deferred Share" issued to the Corporation (discussed below). No share has been issued to any EquitasRe-insured SYA participant, apparently to avoid US state securities law.¹⁸¹ Transfer of any ordinary share or any interest therein is not permitted other than to one or more EquitasRe-insurance Trustees.¹⁸² The Articles prohibit the company from paying any dividend on any ordinary share.¹⁸³

the £1 Deferred Share owned by Lloyd's

- 1.16 Equitas Holdings' one £1 "Deferred Share",¹⁸⁴ apparently an afterthought,¹⁸⁵ to be held only by either the Corporation or its nominee,¹⁸⁶ has been issued to the Corporation,¹⁸⁷ to hold under the

¹⁷⁴ See for example January 21, 1998 letter from Equitas Holdings' chairman to EquitasRe-insured SYA participants on the six months to September 30, 1997. Per *ibid.*, p.1:-

Having considered how best to update you at the halfway stage on the current financial year, we decided to do so in the form of a letter to each Reinsured Name rather than in a more formalised document resembling our Annual Accounts. The main reason for this is that whilst we assess the individual components of our loss reserves and reinsurance recoveries on a continuing basis throughout the year, we only undertake a comprehensive actuarial assessment of the entirety of our loss reserves once a year....

¹⁷⁵ See generally for example *SOD*, p.93.

¹⁷⁶ Equitas Holdings December 5, 1995 Memorandum of Association, §5; Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §4; and see *ibid.*, §2, definitions of "Ordinary Share" ("an issued ordinary share of £50 in the capital of the Company"), "Ordinary Shareholder", and "Permitted Transferee".

¹⁷⁷ See p.15.

¹⁷⁸ See *SOD*, p.93; Equitas Holdings Ltd.'s December 11, 2001 363s annual return made up to December 5, 2001, Section 4 ("Details of Shareholders": "This shareholder jointly owns this shareholding with the previous 6 shareholders").

¹⁷⁹ See Appendix 1.5.

¹⁸⁰ For contractual incidents, see Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), for example §9.2 (pre-emption), 10 (dilution), 11 (fractions), and 24 ("Matters requiring consent of the Ordinary Shareholder"), etc.

¹⁸¹ Equitas Holdings' December 11, 2001 363s annual return made up to December 5, 2001, Section 4 ("Details of Shareholders"). The phrase "Society of Lloyd's" at *ibid.* is bogus: see p.185. And see *SOD*, p.93:-

The share capital of Equitas Holdings will comprise two ordinary shares and one deferred share. The principal reason why it is not feasible to issue shares or provide any other economic or governance interest in Equitas to Names is that this could raise questions concerning the issue of a security under US law. In contrast, the provision of reinsurance normally does not constitute the issue of a security under US law. Accordingly, the ordinary shares of Equitas, which are currently held by Lloyd's, will be transferred to, and held jointly by, the trustees ... of the Equitas Trust.

And see Equitas Holdings RA fpe September 4, 1996, p.4 (Chairman's Statement; "For legal and regulatory reasons, it has not been possible to issue shares in Equitas to Names").

¹⁸² Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §15(a) read with *ibid.*, §2 definition of "Permitted Transferee", of which there are seven (*ibid.*, §16(b) is a coincidence: see for example similarly Equitas Re Articles of Association, §14.2(b)). On registration of such transfer, see *ibid.*, §18(a).

¹⁸³ Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §114:-

It is the intention of the members that the income and property of the Company shall be retained by the Company do that it may be applied towards the payment of a return premium to Names (as they are defined in the Trust Deed [RRC 17]) and to that end no portion of such income and property shall be paid or transferred directly or indirectly by way of dividend, capitalisation of undistributed profits, or otherwise howsoever by way of profit to the members of the Company.

There is thus no relevant income for the EquitasRe-insurance Trustees to distribute under RRC 17 to charity: see *ibid.*, §2.1 etc.

¹⁸⁴ Equitas Holdings' December 5, 1995 Memorandum of Association, §5 as supplemented by the August 30, 1996 decision of the sole member (the Corporation: see for example RRC 17, recital (A)) recorded at *ibid.*, fn. 1; Equitas Holdings

terms of Equitas Holdings' Articles of Association. The share belies Equitas Re's assertion¹⁸⁸ that Lloyd's has no ownership interest in "Equitas" and that Equitas Re and the Lloyd's enterprise are wholly unconnected. Transfer of the Deferred Share or any interest therein is prohibited other than to the Corporation or its nominee.¹⁸⁹ The Deferred Share entitles and requires the Corporation — in practice the Council¹⁹⁰ — to appoint one director, the "Lloyd's director",¹⁹¹ to Equitas Holdings' board¹⁹² and thus¹⁹³ to Equitas Re's and Equitas Ltd.'s boards.¹⁹⁴ The deferred share carries no other express formal rights.¹⁹⁵ In particular, its owner has no right to any dividend,¹⁹⁶ to receive notice of or attend or vote at any Equitas Holdings general meeting,¹⁹⁷ or to share in any winding-up surplus other than such as repays the £1 paid-up share capital.¹⁹⁸ Equitas Holdings is entitled to redeem the Deferred Share for £1 at any time by agreement with the holder, or "upon or at any time after the disposal by Lloyd's of the legal title to or any interest in the Deferred Share"¹⁹⁹ (presumably including where the Corporation passes its legal title to a nominee²⁰⁰). Redemption following the company's winding up is required to be deferred until all other paid-up share capital has been repaid.²⁰¹

board generally

- 1.17 There are typical provisions in Equitas Holdings' articles of association concerning executive directors,²⁰² non-executive directors,²⁰³ and removal from office.²⁰⁴ In relation to authentic²⁰⁵ di-

August 30, 1996 Arts. of Association (as amended by April 26, 2001 written members' resolution), §4. And see *ibid.*, §2, definition of "Deferred Share" ("an issued deferred redeemable share of £1 in the capital of the Company"). And see *SOD*, App 7, p 3-4.

185 The deferred share appears to have been added to Equitas Holdings' December 5, 1995 Memorandum of Association, §5 no earlier than August 30, 1996: see *ibid.*, fn. 1.

186 Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §15(b) deals with this peripherally.

187 See for example recently Equitas Holdings Ltd.'s December 11, 2001 363s annual return made up to December 5, 2001, Section 4 ("Details of Shareholders").

188 See p.5.

189 Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §15(b) read with *ibid.*, §2 definition of "Lloyd's". On registration of such transfer, see *ibid.*, §18(b).

190 See generally Lloyd's Act 1982, ss.3, 6.

191 See generally Equitas Holdings, Articles of Association (August 30, 1996), §60.1-64.

192 *SOD*, p.97.

193 See p.28.

194 *SOD*, p.97. See pp.28, 40.

195 See generally *SOD*, p.97.

196 Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §5(a).

197 Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §5(c).

198 Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §5(b).

199 Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §5(d).

200 See Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §15(b).

201 Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §5(b).

202 Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §§86-88.

203 Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §§83-84.

204 Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §§81-82.

205 Equitas Holdings (like self-regulators-at-Lloyd's in relation to Corporation functionaries²⁰⁵) uses the title "director" misleadingly: Equitas Holdings August 30, 1996 Arts. of Association (as amended by April 26, 2001 written members' resolution), §79:-

The board may appoint any person to any office or employment having a designation or title including the word "director" or attach to any existing office or employment within the Company such a designation or title and may terminate any such appointment or the use of any such designation or title. The including of the word "director" in the designation or title of any

rectors, the articles prescribe a minimum of two and a maximum of sixteen,²⁰⁶ of whom one must be the “Lloyd’s Director” (discussed below) until the Deferred Share is redeemed.²⁰⁷ The latest reported number of directors is ten²⁰⁸ (originally eight²⁰⁹), of whom two are EquitasRe-insurance Trustees,²¹⁰ both said to be non-executive.²¹¹ An Equitas Holdings director may be a RRC 4 Name or Closed Year Name.²¹² He must vacate office when (if the Lloyd’s Director; see below) the Deferred Share is redeemed,²¹³ or (if an EquitasRe-insurance Trustee) he resigns as such a trustee,²¹⁴ or (in any event) he becomes a member of the Council.²¹⁵

one “Lloyd’s Director”

- 1.18** The Deferred Share holder²¹⁶ — in practice, self-regulators-at-Lloyd’s²¹⁷ — is required²¹⁸ to appoint (and to remove and replace²¹⁹) a so-called “Lloyd’s Director”²²⁰ to Equitas Holdings’ board and thus to the boards of Equitas Re²²¹ and Equitas Ltd.,²²² the privilege and the appointment itself lasting until the Deferred Share’s redemption.²²³ He is treated as any other Equitas Holdings director for purposes of retiring from the board.²²⁴ The ordinary shareholders have no right to remove him.²²⁵ A direct link between each Equitas group company and the Lloyd’s enterprise,

such office or employment shall not imply that the holder is a director of the company, nor shall the holder thereby be empowered in any respect to act as, or be deemed to be, a director of the company for any of the purposes of these articles.

- ²⁰⁶ Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members’ resolution), §60.1. See generally *ibid.*, §65 *et seq.* SOD envisaged a maximum of 14 directors: *ibid.*, p.88.
- ²⁰⁷ Equitas Holdings August 30, 1996 Arts. of Association (as amended by April 26, 2001 written members’ resolution), §60.1.
- ²⁰⁸ Equitas Holdings RA fye March 31, 2002, p.22-23 (“Board of Directors”). Cf. Equitas Holdings December 11, 2001 363s Annual Return as at December 5, 2001, Section 2 (“Details of Officers of the Company”).
- ²⁰⁹ SOD, p.89-91.
- ²¹⁰ Equitas Holdings December 11, 2001 363s Annual Return as at December 5, 2001, Section 2 (“Details of Officers of the Company”); SOD, p.94 (“The Equitas Trustees will have the right to appoint two directors to the board of Equitas Holdings”); and see *ibid.*, p.97. Equitas Holdings’ Articles of Association appear to be silent on the point.
- ²¹¹ Equitas Holdings RA fye March 31, 2002, p.22 and 23 (“Board of Directors”). Between them they sit on all five “Equitas” committees (Audit and Compliance; Investment; Nominations; Claims and Commutations; Remuneration Committee): *ibid.*
- ²¹² Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members’ resolution), §89(a).
- ²¹³ Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members’ resolution), §81(g).
- ²¹⁴ Equitas Holdings August 30, 1996 Articles of Assn. (as amended by April 26, 2001 written members’ resolution), §81(i).
- ²¹⁵ Per Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members’ resolution), §60.2, no Council member may be an Equitas Holdings director unless he has served notice of resignation from the Council effective no later than 6 months after the date of appointment as a director. And see *ibid.*, §81(j); SOD, p.97.
- ²¹⁶ See p.20.
- ²¹⁷ In practice self-regulators-at-Lloyd’s: SOD, July 30, 1996 cover letter from the Corporation’s then CEO, p.iv.
- ²¹⁸ Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members’ resolution), §60.1 (“The directors shall not be less than two and not more than sixteen in number, of whom, until such time as the Deferred Share is redeemed, one shall be a Lloyd’s Director”). Cf. *ibid.*, §61 (“shall be entitled to appoint ...”).
- ²¹⁹ Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members’ resolution), §62. On relevant procedure, see *ibid.*, §63.
- ²²⁰ See generally Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members’ resolution), §61-64. And see for example SOD, p.97: “The Lloyd’s deferred share is a mechanism for allowing Lloyd’s to have the right to appoint a director to the board of Equitas Holdings. The director concerned will also serve on the boards of Equitas Reinsurance and Equitas Limited.”
- ²²¹ Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members’ resolution), §76(d).
- ²²² Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §§51, 52 and 59 read with *ibid.*, §2 definition of “Shareholder”.
- ²²³ Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members’ resolution), §§60.1, 61, 81(g).
- ²²⁴ See Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members’ resolution), §74.
- ²²⁵ Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members’ resolution), §82 (“The Company may ... remove *any* director from office ...”; italics added), but see *ibid.*, “except in the case of the removal ... of the Lloyd’s Director” and *ibid.*, §64. The relevant part of *ibid.*, §82 is badly drafted.

his role has never been fully explained, his board and other activities not disclosed — presumably he is not intended to be wholly ineffectual (whether executive or, *a fortiori*, non-executive²²⁶) — the directions he receives from and intelligence he relays to self-regulators-at-Lloyd's not disclosed, and his existence apparently at variance with Equitas Re's claims²²⁷ that the Equitas and Lloyd's enterprises are unconnected.

functions; management

generally

- 1.19 Equitas Holdings' board has five committees: audit and compliance; investment; claims and commutations; remuneration and nominations.²²⁸ It is envisaged that Equitas Holdings will be managed by board delegates.²²⁹ Equitas Holdings' articles of association limit the principal of all money borrowed from third parties by Equitas Holdings, Equitas Re and Equitas Limited to a total of £1bn.²³⁰

board voting

- 1.20 An Equitas Holdings director is disqualified from voting if he has an "interest"²³¹ in relation to a resolution concerning (among other things²³²): (1) matters concerning any "reinsurance contract between any syndicate at Lloyd's of which he is a member and the Company";²³³ (2) a matter concerning RRC 4-defined "Names" and or "Closed Year Names" generally and he is one of them, and the result of the resolution would be to treat him differently.²³⁴

matters requiring prior written approval of the ordinary shareholders

- 1.21 The prior written approval of the EquitasRe-reinsurance Trustees jointly²³⁵ (not just the "senior" trustee) is required for Equitas Holdings to (among other²³⁶ things) close down any business operation, dispose of any shareholding or other interest in any of its subsidiaries,²³⁷ or vary in any respect the memorandum or the articles of association of any subsidiary.²³⁸ Equitas Holdings' exercise of its RRC 7, §9.1 power does not require shareholder approval.

²²⁶ The Lloyd's Director is described in Equitas Holdings RA fye March 31, 2002, p.22 ("Board of Directors") as "non-executive".

²²⁷ See p.5.

²²⁸ Equitas Holdings RA fpe September 4, 1996, p.18-19 (directors' report for the period ended 4 September 1996).

²²⁹ Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §77; *SOD*, p.88: "Equitas will be managed under delegated authority from its board of directors, which will define the limits of the executive management's financial authority and decision making powers. Reporting requirements in respect of delegated matters will be laid down to facilitate effective monitoring by the board."

²³⁰ Equitas Holdings August 30, 1996 Arts. of Association (as amended by April 26, 2001 written members' resolution), §80.2.

²³¹ See Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §102.

²³² See Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §102(a)-(g) for the full list.

²³³ Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §102(f).

²³⁴ Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §102(g).

²³⁵ Compare Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §24 ("prior written approval") with *ibid.*, §49 (voting at company general meetings). The two processes are different.

²³⁶ See the complete list at Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §24(a)-(i).

²³⁷ Equitas Holdings August 30, 1996 Arts. of Association (as amended by April 26, 2001 written members' resolution), §24(c).

²³⁸ Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §24(g).

company general meetings

requisition; quorum

- 1.22 The conduct of Equitas Holdings' general meetings is set out in its articles of association.²³⁹ Requisition of an Equitas Holdings general meeting by members is as per Companies Acts.²⁴⁰ The company's board may convene a company general meeting whenever it wishes.²⁴¹ The quorum for such a meeting is one person holding, or proxy for the holder of, at least one ordinary share.²⁴²

voting

- 1.23 One vote attaches to each fully paid-up²⁴³ ordinary share.²⁴⁴ Where an ordinary share is held by more than one person jointly (as each of the two ordinary shares is²⁴⁵), only the vote of the "senior"²⁴⁶ joint holder is counted, to the express²⁴⁷ exclusion of votes purportedly cast by one or more of the other joint holders. Equitas Holdings' members are the seven EquitasRe-reinsurance Trustees jointly in relation to each ordinary share; the company's only voting member is only one of them in relation to both shares. The Deferred Share carries no company general meeting attendance or voting rights.²⁴⁸

²³⁹ See Equitas Holdings August 30, 1996 Articles of Assn. (as amended by April 26, 2001 written members' resolution), §§25-59.

²⁴⁰ Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §28.

²⁴¹ Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §28.

²⁴² Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §27(a) read with *ibid.*, §5(c).

²⁴³ Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §51.

²⁴⁴ Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §48.

²⁴⁵ See p.20.

²⁴⁶ *Viz.*, whoever of those trustees happens to be listed first in Equitas Holdings' register of ordinary shareholders: see next fn. In the latest public filing, each of the seven EquitasRe-reinsurance Trustees is listed in alphabetical order, except Keeling: see Equitas Holdings' December 11, 2001 363s annual return made up to December 5, 2001, Section 4 ("Details of Shareholders").

²⁴⁷ Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §49: "In the case of joint holders of a share the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders and for this purpose seniority shall be determined by the order in which the names of the holders stand in the register."

²⁴⁸ Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §5(c).

Equitas Re compared to Centrewrite and Lioncover

(*R&R's reinsurance, RTC, and run-off-agency components are not new*)

problem at Lloyd's	insurance solution	RTC solution	run-off agency solution	litigation solution	role of the Lloyd's enterprise
PCW fraud on PCW Names (1986-7 and continuing) (1) impossibility of finding willing seller of conventional-RTC; (2) managing agency difficulty	Lioncover	Lioncover (formerly participants on syndicate 9001's sole YA)	SUM	PCW Offer 1; PCW Offer 2	(1) self-regulators-at-Lloyd's assert that all relevant liabilities are payable 100% at Lloyd's; (2) Lioncover is expressly indemnified by the Corporation; is supported by the Central Fund
difficulty / impossibility in buying conventional outward-RTC (pass-the-parcel fatigue: 1991 and continuing)	Centrewrite	Centrewrite	-	<i>no relevant litigation</i>	(1) self-regulators-at-Lloyd's assert that all relevant liabilities are payable 100% at Lloyd's; (2) Centrewrite is expressly indemnified by the Corporation; is supported by the Central Fund
crisis precipitating R&R (1995-6 and continuing):- (1) pandemic actionable misconduct at Lloyd's; (2) unquantifiable insurance liabilities; (3) impossibility of finding willing seller of conventional-RTC (4) lack of trust of managing agencies	Equitas Re	Equitas Re	Equitas Re	LSO 2	(1) self-regulators-at-Lloyd's assert that all relevant liabilities are payable 100% at Lloyd's; (2) Equitas Re has no express Corporation indemnity; the Council has purported to prevent the Central Fund's use to pay "directly" any EquitasRe-reinsured liabilities (to "ringfence" Members, not to honour "Lloyd's" obligations — arguably a subversion of the Council's self-regulatory function)

EQUITAS RE

regulation

- 1.24** In addition to ordinary English company law²⁴⁹ to which it (like all other companies of the Equitas group) is subject, Equitas Re is subject to ordinary UK and EU primary²⁵⁰ and secondary²⁵¹ insurance legislation — particularly Financial Services and Markets Act 2000, and secondary²⁵² legislation made and various FSA “handbooks”²⁵³ promulgated thereunder. The DTI authorised it as an insurance company subject to various requirements.²⁵⁴ External regulation governing claims handling is discussed elsewhere.²⁵⁵ The FSA, which assumed the DTI’s insurance regulatory function, has indicated that it authorises and regulates Equitas Re like any other insurance company. Equitas Re does not appear to be under the formal control of self-regulators-at-Lloyd’s, though *quaere* the exact role and purpose of the “Lloyd’s Director” on its board.²⁵⁶

principal object

- 1.25** The original “Equitas” company,²⁵⁷ Equitas Re’s principal formal object is to “enter into and implement reinsurance contracts²⁵⁸ for the purpose of reinsuring underwriting liabilities of syn-

²⁴⁹ See p.19.

²⁵⁰ For example Gaming Act 1845, Marine Insurance Act 1906, Marine Insurance (Gambling Policies) Act 1909.

²⁵¹ For example Money Laundering Regulations 1993, SI 1993/1933 Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 1993, SI 1993/3245; Companies (Summary Financial Statement) Regulations 1995, SI 1995/2092; Insurance Companies (Accounts and Statements) Regulations 1996, SI 1996/943; Life Assurance and Other Policies (Keeping of Information and Duties of Insurers) Regulations 1997, SI 1997/265; Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083; Insurance (Fees) Regulations 2001, SI 2001/812; Insurers (Winding Up Rules) 2001, SI 2001/3635; Money Laundering Regulations 2001, SI 2001/3641, etc.

²⁵² For example Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544; Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 SI 2001/1177; Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217; Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227; Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, SI 2001/1335; Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001, SI 2001/1783; Financial Services and Markets Act 2000 (Consequential and Transitional Provisions) (Miscellaneous) Order 2001, SI 2001/1821; Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256; Financial Services and Markets Act 2000 (Meaning of “Policy” and “Policyholder”) Order 2001, SI 2001/2361; Financial Services and Markets Act 2000 (Variation of Threshold Condition) Order 2001, SI 2001/2507; Financial Services and Markets Act 2000 (Gaming Contracts) Order 2001, SI 2001/25; Financial Services and Markets Act 2000 (EEA Passport Rights) Regulation 2001, SI 2001/2511; Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587; Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617; Financial Services and Markets Act 2000 (Insolvency) (Definition of “Insurer”) Order 2001, SI 2001/2634; Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635; Financial Services and Markets Act 2000 (Transitional Provisions) (Authorised Persons etc) Order 2001, SI 2001/2636; Financial Services and Markets Act 2000 (Transitional Provisions) (Controllers) Order 2001, SI 2001/2637; Financial Services and Markets Act 2000 (Controllers) (Exemption) Order 2001, SI 2001/2638; Financial Services and Markets Act 2000 (Transitional Provisions, Repeals and Savings) (Financial Services Compensation Scheme) Order 2001, SI 2001/2967; Financial Services and Markets Act 2000 (Treatment of Assets of Insurers on Winding Up) Regulations 2001, SI 2001/2968; Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Civil Remedies, Discipline, Criminal Offences etc) (No 2) Order 2001, SI 2001/3083; Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001, SI 2001/3592; Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625; Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Business Transfers) Order 2001, SI 2001/3639; Financial Services and Markets Act 2000 (Misleading Statements and Practices) Order 2001, SI 2001/3645; Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Information Requirements and Investigations) Order 2001, SI 2001/3646; Financial Services and Markets Act 2000 (Scope of Permission Notices) Order 2001, SI 2001/3771, etc.

²⁵³ Handbooks etc. include (for example) Glossary; Principles for Businesses; Threshold Conditions; Statements of Principle and Code of Practice for Approved Persons; The Fit and Proper Test for Approved Persons; Interim Prudential Sourcebook for Insurers; Supervision; etc. Radical changes to the FSA’s insurance regulatory regime are afoot: see fsa.gov.uk.

²⁵⁴ See p.A92 (definition of “Notice of Requirements”).

²⁵⁵ See p.71.

²⁵⁶ See p.22-23.

²⁵⁷ Originally called NewCo. Equitas Re etc. are unconnected to (for example) the Canadian corporation using that word (on which see for example *Equitas Investment Corp. v Goodman* (1987) 57 O.R. (2d) 795 (H.C.J.)); Equitas America LLC (a

dicates at Lloyd's and companies under contracts of insurance or reinsurance written by such syndicates or companies by any syndicate year of account reinsured to close either directly or indirectly into those syndicates or companies and to enter into any collateral or ancillary arrangements relating thereto."²⁵⁹ Equitas Holdings²⁶⁰ consent is required to (among other²⁶¹ things) Equitas Re acting other than as a reinsurance company.²⁶² Its principal contractual functions are to reinsure further to RRC 4, §3 and²⁶³ to act as run-off agent further to *ibid.*, §9. Intended to have "no on-going operational role" after entering into RRC 5,²⁶⁴ Equitas Re executed RRC 4 and RRC 5 on September 3, 1996.²⁶⁵ Equitas Re's Articles of Association limit the principal of all money borrowed from third parties by Equitas Re and Equitas Limited to a total of £1bn.²⁶⁶ Equitas Re does not in any legal sense displace any EquitasRe-reinsured SYA participant or relevant claims payment securitisation fund, *a fortiori* as a mere run-off agent: every insurance liability incurred at Lloyd's appears to be payable 100% at Lloyd's.²⁶⁷

supervision of activities

- 1.26 Equitas Policyholders Trustee (which has a duty²⁶⁸ to EquitasRe-assured-at-Lloyd's) has promised to assume without inquiry, and has declared that it intends to so assume, that Equitas Re is duly performing and observing all RRC 4 covenants and provisions,²⁶⁹ and that no RRC 7 Insolvency Event²⁷⁰ has occurred at Equitas Re.²⁷¹ EquitasRe-reinsurance Trustees (who have a duty²⁷² to EquitasRe-reinsured SYA participants) act similarly.²⁷³

securities broker). The word "equitas" occurs jurisprudentially in phrases such as (for example) *equitas nunquam contravenit leges; etsi nihil facile mutandum est ex solemnibus, tamen, ubi equitas evidens poscit, subveniendum est; a equitas est correctio legis generaliter latae qua parti deficit; equitas est quasi equalitas; vigilantibus non dormantibus equitas subvenit; equitas sequitur legem; in fictione juris subsistit equitas; equitas est verborum legis directio efficacius cum muna res solummodo legis cavetur verbis ut omnis alia in aequali genere eisdem caveatur verbis; si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est; etc.*

²⁵⁸ [See principally RRCs 4 (see this Edition, Appendix 1.2) and 19.]

²⁵⁹ December 4, 1995 Memorandum of Association, §3(a) (as re-filed: see Record of Decision of the Sole Member, September 11, 1997). The object's use of "syndicate" and "syndicate year of account" is incoherent.

²⁶⁰ Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution), §2 definition of "Shareholder".

²⁶¹ See the list at Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution), §17(a)-(h).

²⁶² Equitas Re September 2, 1996 Arts. of Assn. (as amended by May 1, 2001 sole member's written resolution), §17(b).

²⁶³ To which extent its Memorandum of Association is deficiently drafted: run-off agency is an entirely different business to reinsurance. On the validity of acts done by a company *ultra* its memorandum of association, see generally Companies Act 1985, s.35.

²⁶⁴ Equitas Re RA 1996, p.4 (directors' report; principal activities); *SOD*, p.82: "Equitas Reinsurance will act as a conduit for the collection of instalments under Structured Payment Plans and the payment, if any, of return premiums. It will, however, have no ongoing operational role. This structure has been developed in discussion with the DTI."

²⁶⁵ Equitas Holdings RA fpe September 4, 1996, p.16 (directors' report for the period ended 4 September 1996); *ibid.*, p.9 (Chief Executive Officer's Review). *Ibid.*: "Literally overnight the Equitas Group became one of the world's largest reinsurers, with £16bn in total assets and perhaps the most difficult claims portfolio ever assembled by one company in the history of the insurance industry."

²⁶⁶ Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution), §58.2.

²⁶⁷ See generally Chapter 3.

²⁶⁸ See generally RRC 7, §2.

²⁶⁹ At RRC 7, §6.1.

²⁷⁰ See generally RRC 7, §2.15.

²⁷¹ At RRC 7, §2.4.

²⁷² See RRC 17, §§2.1 - 2.2.

²⁷³ See p.18.

share capital: ordinary shares only

- 1.27 Equitas Re’s authorised share capital is £100 in the form of one voting £100 share²⁷⁴ issued to Equitas Holdings²⁷⁵ (whose liability to Equitas Re is to that extent²⁷⁶ a maximum of £100). Equitas Re-reinsured SYA participants have no ownership interest in Equitas Re.²⁷⁷ Equitas Re’s necessarily limited assets, from whatever source, are 100% exposed to 100% of each of its potentially unlimited trading commitments, a double sense of unlimited liability. Notwithstanding extensive and expensive quantification efforts,²⁷⁸ Equitas Re started life with fundamental challenges to its balance sheet.²⁷⁹ Equitas Re’s Articles of Association contain restrictive provisions concerning the payment of a dividend by Equitas Re to the ordinary shareholder.²⁸⁰

board

- 1.28 Equitas Re’s board is required to be identical to the Equitas Holdings board.²⁸¹ An Equitas Re director²⁸² is disqualified from voting if he has an “interest”²⁸³ in relation to a resolution concerning (among other things²⁸⁴) any “reinsurance contract between any syndicate at Lloyd’s of

²⁷⁴ December 4, 1995 Memorandum of Association, §5; Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §4. For incidents, see *ibid.*, for example §§8.2 (pre-emption); 9 (dilution);

²⁷⁵ December 4, 1995 Memorandum of Association, p.5 (subscription declaration).

²⁷⁶ Insolvency Act 1986, s.74(2)(d): “[I]n the case of a company limited by shares, no contribution is required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member[.]” In the case of insurance contracts, there are similar provisions limiting a shareholder’s liability: see *ibid.*, s.74(2)(e): “[N]othing in the Companies Act [1986: Insolvency Act 1986, s.436] or this Act invalidates any provision contained in a policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract[.]”

²⁷⁷ And see *SOD*, p.7:-

SOD, p.7:-Names may have previously concluded that the structure of Equitas was intended to provide Names with some of the features of shares in Equitas, particularly regarding economic value and control, while avoiding the need to comply with US securities laws. Names may also have anticipated that Equitas might be able to be transformed in the future into a more conventional structure, to extend its scope of operation and that Names’ potential to receive a return premium might become transferable. These propositions do not reflect the current structure or intentions regarding Equitas and do not reflect the significant changes to the Equitas structure that have been made since the Equitas concept was initially developed. The present structure does not give Names either economic value in, or any control over, Equitas and there is no intention to transform Equitas or to extend its scope of operations.

²⁷⁸ See p.29.

²⁷⁹ See the various audit reports in Equitas Holdings’ published annual accounts.

²⁸⁰ Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §91: “It is the intention of the members that the income and property of the Company shall be retained by the Company so that it may be applied towards the payment of a return premium to Names and to that end no portion of such income and property shall be paid or transferred directly or indirectly by way of dividend, capitalisation of undistributed profits, or otherwise howsoever by way of profit to the members of the Company.”

²⁸¹ Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members’ resolution), §76(d): “The board shall exercise the powers of the Company as shareholder in Equitas Reinsurance Limited so as to ensure that the composition of the board of Equitas Reinsurance Limited and the composition of the board of the Company are identical.”; Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §52. And see *ibid.*, §54(d) (“The board shall exercise the powers of the Company as shareholder in Equitas Limited so as to ensure that the composition of the board of Equitas Limited and the composition of the board of the Company are identical”); Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §52 (“The board will appoint as directors of the Company those persons who are directors of the Shareholder and shall remove them if they cease to be directors of the Shareholder”) read with *ibid.*, §2 definition of “Shareholder”.

²⁸² He may be a Name or Closed Year Name: *ibid.*, §66(a). On compulsory vacation of office on the director ceasing to be an Equitas Re director, see *ibid.*, §59. And see, as to mere number of directors, *ibid.*, §51 (“The number of directors shall be the same as the number of directors of the Shareholder from time to time”). Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §75, first sentence read with *ibid.*, §2, definition of “Shareholder”. And see for example *SOD*, p.88.

²⁸³ See Equitas Holdings August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members’ resolution), §102.

²⁸⁴ See Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §79(a)-(g) for the full list.

which he is a member and the Company”,²⁸⁵ or a matter concerning Names and or Closed Year Names generally and he is one of them and the matter proposes to treat him differently to any other RRC 4 Name or Closed Year Name.²⁸⁶

Equitas Re’s reserves: how calculated

active underwriting misconduct; failure to keep proper records

1.29

By no later than 1982, the massive insurance liabilities which R&R has sought to palliate were already allegedly²⁸⁷ unquantifiable. Throughout the 1980s and early 1990s, some managing agencies also apparently sold insurance on behalf of SYA participants without properly evaluating the risks or quantifying an appropriate premium;²⁸⁸ brokered conventional RTC *ditto*; had contrived that SYA participants should be under-reserved²⁸⁹ (including by (for example) dissipating reserves as false “profit” and bogus “profit commission”); and failed to keep rudimentary relevant records.²⁹⁰ Self-regulators at Lloyd’s so averred in a recent fraud case.²⁹¹ During the same period, aided by members’ agencies and supervised by self-regulators-at-Lloyd’s, some managing agencies habitually placated and encouraged actual and potential SYA participants to participate in and increase their PIL deployed on contiguous YAs of the same syndicate²⁹² (thereby fostering the SYA participant’s delusion of syndicate membership). Before the R&R reserving project,²⁹³ the task of properly reserving for, and managing cashflow to pay, the considerable²⁹⁴ number of APH claims required “virtual clairvoyance” and a “near reckless courage”.²⁹⁵

²⁸⁵ Equitas Re September 2, 1996 Arts. of Assn. (as amended by May 1, 2001 sole member’s written resolution), §79(f).

²⁸⁶ Equitas Re September 2, 1996 Arts. of Association (as amended by May 1, 2001 sole member’s written resolution), §79(g).

²⁸⁷ *Per* (at the latest) the famous March 18, 1982 Neville Russell letter, on which see (for example) *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265 (Cresswell J); *Lloyd’s v Jaffray* {2a} [2000] CLC 725 (Cresswell J).

²⁸⁸ See Reg. Bn. 109/98, November 13, 1998 (“Lloyd’s disciplinary proceedings — case no. LDB9712/40 (Cuthbert Heath Underwriting Ltd.): the defendant had failed (among other things) to disclose the “true” liabilities and assets of SYAs 404-1987, 404-1988, 404-1989 and 404-1990. Related misconduct included the absence of appropriate reserves in those SYAs’ RTC premiums. This misconduct resulted in a £125,000 fine (of which relevant SYA participants presumably receive nothing), permanent revocation of permission to act as a managing agency, and £90,000 costs.

²⁸⁹ And see *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd’s Rep. 618, 624 (Potter J).

²⁹⁰ See for example *Henderson v Merrett Syndicates Ltd. & Ernst & Whinney* {2} [1997] LRLR 265, 324, 326 (Cresswell J).

²⁹¹ *Lloyd’s v Jaffray*, 1996 No. 2032, Points of Reply and Points of Defence to Counterclaim, §66(c) (p.43):-

Lloyd’s — whether through Mr. [Murray] Lawrence, the UAAD or otherwise — had no detailed knowledge of the nature of the business written by any particular syndicate, the extent to which it was exposed to asbestos-related claims and what type of claims, what advice had been received from attorneys and actuaries in relation to any such exposure and the nature of the reinsurance protection available to that syndicate. These matters were known to and were the responsibility of the managing agents and the active underwriters of the syndicates concerned, who in conjunction with the syndicate auditors ... were best placed to determine whether any syndicate year should close and, if so, at what RITC premium.

And see *ibid.*, §67(b) (p.44): “It is admitted, and so far as may be necessary averred, that Lloyd’s did not undertake any investigation or monitoring of the individual or collective results of the syndicates which may have been exposed to asbestos-related claims.” Self-regulators-at-Lloyd’s appear to have contended that such self-imposed ignorance was compatible with proper self-regulation: see for example *ibid.*, §43 (p.30):-

(c) It is denied that Lloyd’s failed to regulate properly or at all the manner in which syndicates exposed to asbestos-related claims or their auditors reserved for and accounted for such liabilities. ... (d) It is denied that Lloyd’s had failed properly or strictly to regulate the activities of agents operating in the Lloyd’s market.

At trial, the fraud allegations were unsuccessful: *Lloyd’s v Jaffray* {2a} [2000] CLC 725 (Cresswell J).

²⁹² See the allegations at, for example, *In the Matter of the Offering of Securities by Lloyd’s [etc.]*, Docket No. S-3073-I, Arizona Corporation Commission, Notice of Opportunity for Hearing [etc.], §47 (Members should not be concerned); §48 (no exposure at all, or exposure properly outwardly reinsured).; evidence in various pre-R&R SYA participants’ litigation against members’ and managing agencies was to the same effect. And see *Brown v KMR Services Ltd.* [1995] 2 Lloyd’s Rep. 513 (CA); *Sword-Daniels v Pitel* [1995] 2 Lloyd’s Rep. 513 (Gatehouse J). Syndicate 134-1988 is a notorious example.

²⁹³ See for example *Equitas NLs 1-5*.

²⁹⁴ Asbestos Working Party lawyers reported in January 1983 suits at the rate of 500 per month: *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265, 337 (Cresswell J). *Ibid.*:-

As at February, 1983 ... minutes of a panel auditors meeting recorded the following. In June, 1982 the US Labor Department gave the following statistics: 21 million workers have been significantly exposed to asbestos in the last 40 years. 8200-9700

In the course of the Equitas Reserving Project exercise (discussed below), it became apparent that, apparently contrary to representations²⁹⁶ to actual and potential Members and SYA participants and notwithstanding the acknowledged²⁹⁷ and obvious²⁹⁸ need to do so, self-regulators-at-Lloyd's (responsible²⁹⁹ for maintaining sufficient common-use funds to pay all relevant liabilities) had apparently not required consistency of records,³⁰⁰ including in relation to outward rein-

deaths from cancer attributed to asbestosis per annum for the next 20 years. 3000 products in daily use contain asbestos. US\$38 million total claims for deaths expected. At present there are 25,000 plus claims on the data base for direct asbestosis claims.

²⁹⁵ Evidence of Asbestos Working Party chairman to US Senate Labor and Human Relations Committee's sub-committee on Labor, March 1985 quoted in *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265, 351 (Cresswell J).

²⁹⁶ See for example Corporation RA 1969-1970 ("The object is as it has always been, to provide vital information on which the Market can base reliable judgments as situations develop"); Statement by Peter Green, Chairman, p.2, General Meeting of Members of Lloyd's, Wednesday 4th November 1981 ("The development of computer based systems to handle information about Members, their underwriting allocations, their deposits and reserves is therefore being progressed as quickly as possible"); Address by Mr. Peter Green, Chairman, p.5, General Meeting of Members of Lloyd's, Wednesday 19th November 1980 ("The management services group, which among other things operates the Corporation's computers at Chatham, has made considerable progress in developing both the redesigned central accounting system and the membership system"); Statement by Peter Green, Chairman, p.3, General Meeting of Members of Lloyd's, Wednesday 17th June 1981 ("new Systems and Communications Policy Board which is designed to oversee the use of information handling technologies ... the aim being compatibility of all forms of computing and other electronic equipment"; "re-design of the Central Accounting system has continued smoothly ... [B]ehind the scenes a very large data base has been built up... Lloyd's has always been concerned with technological innovation"); Statement by Mr. Peter Green, Chairman, p.1, General Meeting of Members of Lloyd's, Wednesday 4th November 1981 ("Your Committee believes that it is necessary for Lloyd's to reinforce its efforts to enhance the systems serving the Market and to plan for the use of the new information handling and communications technologies"); Statement by Sir Peter Green, Chairman, p.1-2, General Meeting of Members of Lloyd's, Wednesday 23rd June 1982 ("Systems and Communications Policy Board" ... "our major computer suppliers and advisers" ... "our contribution to Information Technology Year" ... "I am happy to report that development work on the redesign of the Central Accounting System"); Statement by Sir Peter Green, Chairman, p.3, Extraordinary General Meeting of Members of Lloyd's, Wednesday 17th November 1982 ("Systems and Communications Policy Board has continued to investigate the possible future uses of information technology at Lloyd's and has completed a number of important studies. As a result it is likely to be able, by the end of this year, to make important strategic recommendations to the Committee"); Statement by Sir Peter Green, Chairman, p.4, General Meeting of Members of Lloyd's, Wednesday 22nd June 1983 ("The Committee and the Council have been reviewing the work of the Systems and Communications Policy Board in planning for the future use of information technology at Lloyd's" ... "rapid adoption of this technology" ... "The Council recognises the need for it to take a lead in the development of a strategy for the use of information technology and has endorsed the proposals of the Systems and Communications Policy Board for further studies in 1983. Perhaps the most important of these studies is concerned with the methods of processing the insurance business transacted in the Market" ... "the best technical basis"); Statement by Mr. Peter Miller, Chairman, p.5, General Meeting of Members, Wednesday 24 June 1987 ("the establishment of [the London Insurance Market Network] is the first successful attempt to harness modern information technology to the needs of the whole London insurance market including Lloyd's. It will improve the flow of information between underwriters and brokers; it will allow better control of risk by timely settlement of premiums and claims. ... Clearly we can now look forward to an extension of the use of information technology in relation to many other of the Corporation's activities"); *One Lime Street*, January 1994, p.20 ("Information is the backbone of the Lloyd's market. Without the factual and statistical analysis of events, good underwriting decisions cannot be made. Although some information, especially marine, has traditionally been available from Lloyd's of London Press Ltd through Lloyd's List, specialised publications and the intelligence newswire, it was less than a decade ago that a centralised source of statistical and business information was set up as the planning department of the Corporation").

²⁹⁷ See for example General Meeting of Members, Wednesday 29 June 1988, Statement by Mr. Murray Lawrence, Chairman, p.2: "Present market conditions, uncomfortable though they may be, are overshadowed by the need to provide for the development of past year claims, some as yet unnotified and unquantified, springing mainly from long tail liability business in the United States."

²⁹⁸ See historically for example *Cromer WP*, p.40:-

[W]e consider that the information collected in the [Lloyd's Policy] Signing Office and the facilities for analysis afforded by the computer offer opportunities that should not be neglected. ... Risk can be broken down into categories in which recent experience may afford a useful guide to future practice. There is of course a wealth of literature on this subject in the various professional journals and a wealth of experience among business consultants who can be brought in to advise. There is a narrower field where the Signing Office could help — namely general information about the history of certain risks.

²⁹⁹ See p.99.

³⁰⁰ Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal* 1998, p.62, 63: "Now, for the most frequently asked question ... "How many claims do you face?", to which the honest answer is that we don't know since ninety different businesses [managing agencies] counted different things in different ways and the figures could not be added together." And see *Equitas Holdings RA* fye March 31, 1998, p.11 (Chief Executive Officer's review):-

surance,³⁰¹ and had not³⁰² sought, collected, or retained timely or other reliable, complete data³⁰³ of SYA participants' exposure to either APH³⁰⁴ or non-APH³⁰⁵ liabilities (Nor perhaps had SYA participants' auditors³⁰⁶). Self-regulators-at-Lloyd's were excoriated by a House of Commons investigation accordingly.³⁰⁷

the Equitas Reserving Project generally

- 1.30 In the Equitas Reserving Project,³⁰⁸ £130m³⁰⁹ of Corporation money appears to have been spent attempting to ascertain the extent of SYA participants' and (through the Central Fund) Members' exposure to those liabilities. In that exercise, self-regulators-at-Lloyd's averred two principal objectives: to ensure that Equitas Re's reserves were based on a "best estimate" of its future obligations, recognising that "finality" was provided through Equitas Re's long-term viability, and to ensure that the premium was payable as between different EquitasRe-reinsured SYA participants on a consistent basis, by applying common reserving approaches across all "syndi-

The data in the group's possession was obtained from a variety of sources, including approximately 90 independent syndicate managers, Lloyd's bureaux and the Lloyd's Reserving Project It was inevitable that significant variations existed in the quality and consistency of this data.

It was inevitable only because self-regulators-at-Lloyd's had not previously required consistency.

- 301 Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal* 1998, p.62, 65 ("Our reinsurances and retrocessions are so complex that we quite literally cannot tell how any particular solution will ultimately impact Equitas"). And see fn. 300 above.

- 302 See for example *Walker CR*, §1.13 (p.8):-

[W]e have ... had considerable recourse to data held centrally at Lloyd's. But some of this material was insufficient for our purposes: for example, Lloyd's does not hold data in readily retrievable form on the historic performance of syndicates and Lloyd's Policy Signing Office ... does not retain data in a form apt for analyses of business undertaken in the market such as LMX spiral transactions. ... [W]e propose that Lloyd's centrally should, in future, be more attentive to the collection, quality and accessibility of data for the purposes of analysis such as that carried out by the [Walker CR] committee

And see *One Lime Street*, January 1994, p.7:-

[T]here had previously been no attempt to establish sound data on old year liabilities, but this task was now being undertaken by three teams of independent actuaries which were analysing likely claims and the known reserves for the pre-1986 underwriting years. There could be no accurate estimate of the old years liability until this research is completed in the late summer.

- 303 But the Corporation had had extensive computer systems for some time. See for example the Corporation's Membership Department's Manager's December 10, 1979 letter, first unnumbered page ("During the last two years, a complete review of Membership Department activities has taken place and development of a new computer system covering all functions of the Department has started"). And see the Corporation's Membership Department's Manager's August 12, 1980 letter and the Corporation's Membership Group's Group Manager's August 15, 1980 letter to Market practitioners on the same subject.

- 304 See also *One Lime Street*, January 1994, p.7:-

[T]here had previously been no attempt to establish sound data on old year liabilities, but this task was now being undertaken by three teams of independent actuaries which were analysing likely claims and the known reserves for the pre-1986 underwriting years. There could be no accurate estimate of the old years liability until this research is completed in the late summer.

- 305 See for example *Equitas Holdings RA fpe* March 31, 1997, p.24 (Report of the auditors):-

6. Syndicate historical data, much of which was inherited by the Equitas Group from the Reserving Project, ... is not complete and accurate in all respects and has not been subject to an independent audit. 7. As a consequence, the evidence we considered necessary for our audit is not wholly available in respect of the following: (a) the provision for claims outstanding in respect of non-APH liabilities; (b) reinsurers' share of claims outstanding; and (c) exposure to individual reinsurers and consequently the appropriate of bad debt provisions.

- 306 Recalling *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow and Ernst & Young* [1997] LRLR 678, 758 (Colman J; "Accountants involved in Lloyd's audit work, such as Littlejohn Frazer and E&Y, would be aware in general and outline terms of actuarial reserving techniques, for the question of the level of a syndicate's reserve would be material to their audit work").

- 307 See *Treasury Sel. Comm. 1, passim*. And see the allegations in *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J).

- 308 See the summary at *SOD*, p.67 *et seq.*; *Price and Price v Lloyd's* [2000] Lloyd's Rep IR 453, 457-458 (Colman J). And see contemporaneously for example Market Bulletin Y213, April 12, 1996 ("Equitas: syndicate premium estimates"); Market Bulletin Y178, March 18, 1996 ("Finalisation of Equitas reserve estimates"); Market Bulletin Y130, January 29, 1996 ("Equitas syndicate consultation process").

- 309 Corporation RA fye December 31, 1996, p.34 (Notes to the financial statements, note 10): 1993: £0.607m; 1994: £10.096m; 1995: £51.106m; 1996: £68.191m.

cates”.³¹⁰ The exercise produced a “best estimate” of insurance liabilities as at 31 December 1995 on an undiscounted basis “neither conservative nor optimistic”,³¹¹ aiming to arrive at an “affordable”³¹² (thus accurate principally by coincidence) EquitasRe-reinsurance premium for each putative EquitasRe-reinsured SYA participant (in due course evidenced for each such Member by a so-called “Lloyd’s Statement of Reinsurance”³¹³) as at 31 December 1995, taking into account syndicate assets, PSL, and Equitas Re’s future operating costs.³¹⁴

particular methodology

- 1.31** The R&R reserving exercise particularly involved the introduction of standardised reserving methodology,³¹⁵ apparently achieved by (for example): (1) setting up a Market committee called the Reserve Group to review the reserving exercise and provide Market input;³¹⁶ (2) ascertaining relevant YAs (principally 1985 and prior);³¹⁷ (3) collecting relevant data;³¹⁸ (4) assessing the likelihood of outward reinsurance recoveries;³¹⁹ (5) taking into account various subsidiary elements such as PSL,³²⁰ and the entire cost of Equitas Re running off 1992 and prior liabilities;³²¹

³¹⁰ SOD, p.67.

³¹¹ SOD, p.6.

³¹² See for example SOD, p.67: “In approving the Equitas premium, the Council was required to balance the assessment of the liabilities, the nature of the risks being transferred and the viability of Equitas against the need to have regard to what is affordable by Names and the adverse consequences (to Names and policyholders) that would follow from a failure of the Reconstruction and Renewal plan.” The risk of the reserve being insufficient falls principally on the Lloyd’s enterprise: see Chapter 3. And See for example S&M, p.15:-

44. In determining the premiums at which all 1992 and prior liabilities are to be reinsured into Equitas, a very difficult balance has to be achieved. If the required premiums, are too high, Names will not be able to afford them and R&R will fail. If they are too low, the long term viability of Equitas will be in doubt, thus precluding its authorisation by the DTI. 45. With the help of the Names Committee chaired by Sir Adam Ridley, Lloyd’s has tried to allocate the “settlement fund” of £2.8 billion between Names in such a way as to make the Equitas premiums “affordable” by individual Names. ... 46. It follows, in our view, that the final figures, whenever made available, will be capable of being criticised. There will, in any event, be a considerable degree of inherent uncertainty in them

³¹³ Dated and or sent out on or around December 27, 1997.

³¹⁴ SOD, p.67.

³¹⁵ P. K. Demmerle (an attorney at LeBoeuf, Lamb, Greene & MacRae LLP), *An Overview of Lloyd’s Plan in Journal of Re-insurance*, vol. 3, no. 1, Fall 1995, p.72, 74 (“The Equitas project has caused: standardized reporting across the entire Lloyd’s market; the construction and evaluation of the market’s ceded reinsurance portfolio; and liabilities to be evaluated on an exposure-based methodology”).

³¹⁶ SOD, p.68, 70. *Ibid.*:-

It was recognised that the reserving project could only be satisfactorily concluded following substantial consultation with the market. The prime purpose of this consultation was to check the quality and accuracy of existing data and the calculations based on that data. This also proved invaluable in identifying additional data. Agents have been involved in testing the assumptions made by the reserving project and its external professional advisers. The consultation process started in November 1995 and finished in May 1996 and has been a critical part of the reserving project.

³¹⁷ SOD, p.68. And see generally *ibid.*, p.70-77. *Ibid.*, p.68-9:-

Following the general change to the ‘claims made’ wording, the exposure to long-tail US APH liabilities originally allocated to the 1986 to 1992 years of account is not as significant as that originally allocated to the 1985 and prior years of account.

³¹⁸ SOD, p.69-70. *Ibid.*, p.69:-

From the outset, it was recognised that a key component of the reserving exercise was to collect data based on which a comprehensive reserving analysis could be carried out. Data was collected from a wide range of sources and was processed by the reserving project with support from Ernst & Young. The main sources of data included: the syndicates themselves, who provided extensive data through responses to specific questionnaires and by completing syndicate returns; and information held centrally by Lloyd’s and various claims offices including the Specialist Claims Unit, London Market Claims Services, Lloyd’s Claims Office and Lloyd’s Policy Signing Office.

³¹⁹ SOD, p.77. Outward reinsurance details were collated onto a central database. The reserving project took into account reinsurer failure (as to which appropriate bad debt provisions, using credit ratings, were made, and reinsurance disputes, the “more material” of which were assessed by a legal panel that included retired appellate court judges, plus senior insurance practitioners drawn from in and outside the Market: SOD, p.77.

³²⁰ See generally for example SOD, pp.3, 77, 105-110. The reserving project and R&R finality statements took into account around 150,000 PSL policies for 1992 and prior YAs that some 24,000 Members had bought from (among others) other Members (who had provided 90% of the cover), who in turn had reinsured with other Members: see generally SOD, p.77, 105. Not surprisingly, “[a]n extensive [computer] model had to be created. This was a complex process involving a sub-

(6) uniform centralised actuarial input;³²² (7) marshalling available SYA assets: assets held in relevant PTFs in relation to 1992 and prior business were valued as at December 31, 1995 at £9.9bn (excluding Members' relevant debt and including cash, investments and reinsurance accruals) based on standard-form returns filed by managing agencies;³²³ (8) discounting of assets (regulatorily permitted³²⁴), initially at 6%, to take into account Equitas Re's investment return over an estimated run-off period of forty years.³²⁵ Equitas Re continues to discount its assets³²⁶

stantial amount of data and millions of individual calculations, which could only be completed once Names' other liabilities had been established. Similar treatment has been given to those syndicates that wrote EPP policies": *ibid.*, p.77.

321 *SOD*, p.78. *Ibid.*:-

The total operating costs of running off the 1992 and prior liabilities have been estimated by Equitas to be approximately £1.2 billion discounted on the same basis as the liabilities. This sum has been included in the Equitas premium. These costs cover all Equitas' costs including fees of its sub-contractors and advisers for claims handling, run-off management, asset management and administration from the start of its operations until all claims have been paid. It is estimated that it will take around 40 years to run off these liabilities.

The one-off provision included "Equitas" central management costs, certain start-up costs, and the costs of "integration and centralisation": *ibid.* "Costs were allocated to syndicates broadly on the basis of their current cost base and their estimated claims payment profile. The Council believes that the Equitas costs represent a significant saving over the cost of running off the 1992 and prior liabilities under the current market structure": *ibid.*

322 See for example *SOD*, p.79:-

The reserving exercise was comprehensive and it was not considered practical for there to be an independent review of the detailed judgements and calculations or an independent audit of the data. It was, however, considered appropriate to retain Tillinghast, inter alia, to analyse whether the processes used by the reserving project were reasonable in relation to Lloyd's intent of producing a 'best estimate' of insurance liabilities on an undiscounted basis.

323 *SOD*, p.79. Financial reinsurances were considered positive assets rather than a reduction in liabilities; the valuation methodology was consistent with that used to value relevant insurance liabilities and reinsurance recoveries, and managing agencies had to segregate relevant net assets for each EquitasRe-reinsured YA, and a process was established to monitor credit and debit transactions from December 31, 1995: *ibid.*, p.79-80. *Ibid.*, p.80:-

The Equitas premium which will be received by Equitas Reinsurance to reinsure the 1992 and prior business will be the value of the assets held in the segregated accounts referred to above on the date the Equitas premium is paid and the amount of the Equitas additional premium which has been charged to Names as part of their finality bills.

324 See for example *SOD*, p.143:-

[T]he DTI has permitted Equitas to discount the 1992 and prior liabilities to take into account the return which Equitas believes it can earn on its invested assets. This is not customarily the practice in the Lloyd's market or in the US. There can be no certainty that Equitas will be able to achieve an investment return sufficient to justify a 6 per cent. discount. Equitas may also be required to meet the 1992 and prior liabilities at a faster rate than that assumed in setting the Equitas premium, reducing its ability to earn the assumed investment return on its reserves.

325 *SOD*, p.79. "Equitas believes that it will be able to adopt a longer-term investment strategy than a syndicate which operates as an annual venture and will be able to discount liabilities at a higher rate than that used to set the Equitas premium": *SOD*, p.82. *Ibid.*:-

The DTI, as a condition of authorisation, requires an insurance company to show an appropriate surplus of assets over liabilities explicitly on its balance sheet. The premium to be charged by Equitas Reinsurance to syndicates is discounted to reflect the expected timing of claims payments. ... The adoption of this higher discount rate will generate a surplus in Equitas Reinsurance. ... The surplus will be contributed to Equitas Limited as a non-taxable contribution explicitly to support that company's margin of solvency.

And see *ibid.*, p.141:-

Equitas believes that it is able to justify discounting its liabilities at a rate of 6 per cent. However, in setting the Equitas premium, the 'best estimate' has only been discounted using an average rate of 4.3 per cent. The difference between the liabilities discounted at the two different rates will strengthen the Equitas reserves by around 1880 million. In addition, a general IBNR provision of approximately 1900 million has been added to the 'best estimate', further strengthening the Equitas reserves.

326 See recently for example Equitas Holdings RA fye March 31, 2002, p.18 (Financial review):-

Since we expect the liabilities to be settled over a long period of time, they have been discounted to acknowledge the time value of money. The return to be earned in the future on the investments that are held to meet these liabilities is anticipated through this process of discounting. The calculation of an appropriate discount rate is based on the concept that the prospective return on what is essentially a duration and currency matched fixed income portfolio, if held to maturity, will be approximately equal to its current yield to maturity. The methodology we adopt includes the following steps: the discounting of all liabilities backed by conventional bonds or financial reinsurances by yields on government fixed interest securities of appropriate currency and duration; the discounting of all liabilities backed by index-linked bonds by the real yield on government index-linked securities of appropriate currency and duration plus the price inflation assumption for that currency that has been used for the projection of our liabilities; the calculation of a uniform flat rate of discount to give the same total result as in the steps above; and the application of an appropriate margin for prudence. The margin for prudence takes account of the fact that the liabilities are not perfectly matched, since the investment benchmarks we set our fund managers do not precisely reflect the liability cash flows and the cash flows themselves cannot be precisely predicted. The discount rate is reviewed each year to ensure that it remains a prudent estimate of the average annual return expected to be achieved for the pe-

but appears to apply no countervailing premium to growth in, or other adverse uncertainties relating to, relevant liabilities; (9) “reserve strengthening”³²⁷ by: (a) approximately £880m, achieved by discounting some liabilities at 6% and others by an average of only 4.3%;³²⁸ (b) around £900m by way of an IBNR provision allocated to all relevant SYAs in proportion to their net underwriting liabilities (excluding PSL, EPP and relevant agreed e&o contributions).³²⁹ The exercise also featured, apparently, no independent audit³³⁰ (but scrutiny by the Government Actuary³³¹); superficial third party review,³³² apparently “thorough” review at Lloyd’s;³³³ fixation of reserves as at a particular date, *viz.*, March 31, 1996;³³⁴ dependence on data provided by sources within the Lloyd’s enterprise;³³⁵ and considerable inherent uncertainty,³³⁶ especially re APH.³³⁷

riod for which these assets are likely to be held. For the year under review, we have increased the discount rate to 5.25 per cent per annum from 5 per cent per annum to reflect current market yields and our expected claims payment patterns.

The discount rate as at the Equitas Group’s published financials fye March 31, 2001 was 5%: Equitas Group RA fye March 31, 2001, p.54. Per *ibid.*, the run-off period was still estimated at 40 years: “The long tail liabilities are expected to be paid out over a period in excess of forty years with the majority of the remaining liabilities expected to be settled in the next several years”. Historically, see for example *SOD*, p.82 (“Equitas [Ltd.] believes that it will be able to adopt a longer-term investment strategy than a syndicate which operates as an annual venture and will be able to discount liabilities at a higher rate than that used to set the Equitas premium”). Equitas Re charged discounted EquitasRe-RTC premium (so far as one can tell, a premium is an asset, not a liability): see for example *ibid.*:-

The premium to be charged by Equitas Reinsurance to syndicates is discounted to reflect the expected timing of claims payments. Equitas believes that it will be able to adopt a longer-term investment strategy than a syndicate which operates as an annual venture and will be able to discount liabilities at a higher rate than that used to set the Equitas premium. The adoption of this higher discount rate will generate a surplus in Equitas Reinsurance. As Equitas Reinsurance will be structured as a mutual company for tax purposes, this surplus will not be taxable. The surplus will be contributed to Equitas Limited as a non-taxable contribution explicitly to support that company’s margin of solvency.

Discounts are predicated on (for example) the discount time period being accurate; investment return rate matching the discount rate; liabilities not cancelling out the discount; operating costs being as forecast, etc.

³²⁷ See generally *SOD*, p.79.

³²⁸ *SOD*, p.79

³²⁹ *SOD*, p.79.

³³⁰ See for example Tillinghast-Towers Perrin’s July 25, 1996 letter to the Council and to the “Board of Equitas” at *SOD*, App. 4. Per that letter (at *SOD*, App. 4, that letter, p.2):-

The [Equitas Reserving] Project has based the Provision [*viz.*, “future operating expenses and the best estimate of insurance liabilities on an undiscounted basis to be assumed by Equitas Reinsurance Ltd.”: *ibid.*, p.1] on analyses conducted by independent qualified actuaries, other independent professionals, Lloyd’s staff and the various Managing Agencies. The Project made use of these analyses and the specific findings, conclusions and results therein. The Council of Lloyd’s has advised us that given their views on the comprehensive nature of the reserving exercise, it was impractical for there to be an independent audit of the data or for there to be an independent actuarial review of the detailed judgments and calculations underlying the Provision, both of which would have been a necessary part of any actuarial firm determining for itself whether the Provision was reasonable.

³³¹ See *SOD*, p.80, quoting the then Minister for Trade that “the Government Actuary takes the view that there is a reasonable prospect that Equitas will be able to pay off its liabilities in full as they fall due”.

³³² See for example Tillinghast-Towers Perrin’s July 25, 1996 letter to the Council and to the “Board of Equitas” at *SOD*, App. 4, quoted at fn. 330.

³³³ See *SOD*, p.80, quoting the then Minister for Trade that “Lloyd’s proposals are based on a thorough review of the 1992 and prior liabilities and in particular of their exposure to U asbestos and pollution claims”.

³³⁴ See for example Tillinghast-Towers Perrin’s July 25, 1996 letter to the Council and to the “Board of Equitas” at *SOD*, App. 4, that letter, p.2; and see *ibid.*, p.4:-

Certain events have come to our attention that have occurred between 31 March 1996 and the date of this letter which may have a significant positive or adverse affect [sic] on the Provision in total and its allocation to members. These events include the Georgine court decision which may cause a change in the method of resolution of certain asbestos claims in the US. While a complete analysis of the effects of these events is beyond the scope of our engagement, based on information currently available to us we do not believe that our findings would be significantly altered.

³³⁵ See for example Lazard Brothers & Co., Ltd.’s July 30, 1996 letter to the Council at *SOD*, App. 4, that letter, first unnumbered page:-

[I]n forming our opinion we have assumed and relied upon the accuracy and completeness of the reports and other information provided to us and all representations made to us by the Council, Equitas or their respective advisers and auditors and we have not undertaken any independent verification of such representations, reports or other information.

See also for example Tillinghast-Towers Perrin’s July 25, 1996 letter to the Council and to the “Board of Equitas” at *SOD*, App. 4, that letter, p.3:-

In conducting our analysis, we have used data and other information supplied to us by various areas within Lloyd’s. In many cases, we were specifically informed that neither we nor Lloyd’s could place formal reliance on such information, though we

Equitas Re has apparently recently undertaken a thorough reexamination of EquitasRe-reinsured SYA participants' inward reinsurance liabilities.³³⁸ Various third party advisers including a merchant bank³³⁹ and a firm of actuaries³⁴⁰ opined (under pressure of time³⁴¹) on the "ambitious and brave"³⁴² Equitas Reserving Project's³⁴³ process³⁴⁴ and had no objection to it.³⁴⁵ The process' ap-

have been allowed to use it. The scope of this engagement did not include audit or independent verification of this data and information. Our conclusions depend heavily on the accuracy of this data and information.

336 See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.3:-

There is inherent uncertainty in any estimates of claims and claims expense reserves. Future claim experience is likely to deviate, perhaps materially, from the underlying estimate. This is because the ultimate liability for claims will be affected by future external events, such as the likelihood of claimants bringing suit, the size of judicial awards, changes in standards of liability, and the attitudes of claimants towards settlement of their claims.

337 See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.3:-

It should ... be noted that the portion of the Provision related to asbestos, pollution and health hazard liabilities is subject to greater uncertainty than many other types of unpaid loss liabilities. The Provision does not include specific allowance for material extraordinary changes to the legal, social or economic environment (or to the interpretation of policy language) that might affect the costs, frequency, or future reporting of claims or for potential future claims arising from causes not substantially recognised in the historical data. The additional reserves are intended by Lloyd's to provide for this amongst other contingencies. In the case of US pollution liabilities, there is uncertainty in respect of future legislative and administrative reforms. The Provision is based on an assumption that some reforms will occur; such assumption being material in relation to the additional reserves.

338 See Equitas Group June 21, 2002 press release (EQ36; "Equitas announces financial results for year ended 31 March 2002"), Commentary on Equitas' financial results for the year ended 31 March 2002, p.1:-

During the year a review of all inwards reinsurance asbestos liabilities was undertaken on a more comprehensive basis than had been done since the Lloyd's Reserving Project. The review concluded that this category of reserves was overstated in terms of ultimate gross losses, but that actual payment of inwards reinsurance claims would be somewhat more rapid than had been previously forecast. The positive impact derived from this analysis was largely offset by policyholder-specific and other specific reserve increases, and the aggregate result of asbestos reserve re-evaluations on a net discounted basis was negligible.

339 See for example Lazard Brothers & Co., Limited's July 30, 1996 letter to the Council at *SOD*, App. 4. Per that letter (at *SOD*, App. 4, that letter, p.2):-

... The opinion of Lazard Brothers & Co., Limited is for the sole benefit of the Council and may not be used or relied upon by any other person and should not be taken to constitute a recommendation to individual Names to accept the settlement offer. Based upon and subject to the foregoing, it is our opinion, from a financial point of view, that the decision of the Council that the Reconstruction and Renewal plan is in the best interests of the Society is reasonable and has been reached after careful enquiry.

340 *SOD*, p.6 and see *ibid.*, p.68-9, 71, 73, 79, 141. See also Tillinghast-Towers Perrin's July 25, 1996 letter at *ibid.*, App. 4, which expressed a belief that "the process used by the Project to determine the Provision is reasonable and the methods and assumptions used are appropriate overall in relation to the stated objective of providing a best estimate on an undiscounted basis" (*ibid.*, p.2). The letter cited Tillinghast's reliance on data and other information supplied to it by "various areas within Lloyd's. In many cases, we were specifically informed that neither we nor Lloyd's could place formal reliance on such information, though we have been allowed to use it. The scope of this engagement did not include audit or independent verification of this data and information. Our conclusions depend heavily on the accuracy of this data and information" (*ibid.*, p.3). The letter also cited (*ibid.*):-

inherent uncertainty in any estimates of claims and claims expense reserves. Future claim experience is likely to deviate, perhaps materially, from the underlying estimate. This is because the ultimate liability for claims will be affected by future external events, such as the likelihood of claimants bringing suit, the size of judicial awards, changes in standards of liability, and the attitudes of claimants towards settlement of their claims. It should also be noted that the portion of the Provision related to asbestos, pollution and health hazard liabilities is subject to greater uncertainty than many other types of unpaid loss liabilities.

341 See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.4:-

The timetable of the Reconstruction and Renewal plan, including its impact on the consultation process with the market, has acted as a constraint on the depth of various analyses underlying the [Equitas Reserving] Project's determination of the Provision, the value of Insurance Related Assets, and cashflow. This may have increased the uncertainty inherent in the Provision.

342 *Treasury Sel. Comm. 1*, §63.

343 *SOD*, p.67: "An essential element of the Reconstruction and Renewal plan has been the process by which the reserves required to meet the 1992 and prior liabilities to be reinsured into Equitas [Re] have been estimated, based on which the Equitas [Re] premium payable by Names has been agreed by Lloyd's with the DTI and Equitas." See generally for example *SOD*, p.67-80; *Equitas NLs*.

344 See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4:-

parently excessive reliance on assumptions has been criticised,³⁴⁶ and their uncertainty acknowledged in *SOD*³⁴⁷ and in the qualified reports of Equitas Re's auditor in Equitas Group consolidated accounts.³⁴⁸ The EquitasRe-reinsurance premiums eventually arrived at by the Equitas Re-

[that letter, unnumbered first page] The purposes of this analysis were to determine whether: (i) the process used by the [Equitas Reserving] Project to determine the Provision is reasonable in relation to Lloyd's intent of producing a best estimate of the insurance liabilities and future operating expenses, being neither conservative nor optimistic, and (ii) the process used by the Project to determine the value of the Insurance Related Assets is consistent with the approach used to determine the Provision, and (iii) the process used by the Project to determine the cashflows is consistent with the approach used to determine the Provision, and (iv) the process used by the Project to allocate the Provision, as discounted by the Project, to members of Lloyd's is reasonable in relation to Lloyd's intent to make such allocation on a consistent basis, ie by applying common reserving approaching across all syndicates. [*ibid.*, p.2] We have ... been asked to review, and have only reviewed the process by which the [Equitas Reserving] Project made use of these analyses and the specific findings, conclusions and results therein [*ibid.*, p.3] We believe that the process followed in the allocation of the discounted Provision to the members is reasonable

³⁴⁵ See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.3:-

Based on our analysis, we believe that the process used by the [Equitas Reserving] Project to determine the Provision is reasonable and the methods and assumptions used are appropriate overall in relation to the stated objective of providing a best estimate on an undiscounted basis. In addition, we believe that the processes use to determine the value of the Insurance Related Assets and cashflows are consistent with the approach used to determine the Provision.

³⁴⁶ See for example *Lloyd's: Re-establishing the Franchise, Managing the Risks* (Moody's Investors Service, October 1997), p.11:-

[S]etting the premium for Equitas was the result of an arduous actuarial process involving many iterations, but having the premium level accepted had some elements of negotiation. Moody's believes this process of negotiation, symbolised by the substantial credits provided to Names (essentially, bad debt write-offs), could have weakened Lloyd's ability to set strong provisions at Equitas. Because of the nature of the liabilities ... and the relative illiquidity and weak capitalisation of Equitas, future deviations from the assumptions made during the reserving exercise could have material consequences for its financial strength. For instance, looking at the balance sheet as struck on 4 September 1996, a 10% write-off of debtors or reinsurance receivables, all other things being equal, would wipe out the entire capital base of Equitas.

³⁴⁷ See for example *SOD*, p.142:-

[F]or any insurer the establishment of loss reserves is an inherently uncertain process and claim payments may exceed reserves. In particular, asbestos, pollution and health hazard liabilities are subject to greater uncertainty than many other types of liabilities. The reserving project's estimate of APH liabilities account for approximately 40 per cent. of the estimated liabilities of Equitas on a discounted basis net of reinsurance as at 31 December 1995. As explained in Chapter 1, the actual premium to be received by Equitas Reinsurance will be substantially lower than that assessed as at 31 December 1995 and, accordingly, the proportion of liabilities represented by APH claims is likely to be significantly higher than 40 per cent. when the Settlement Agreement becomes unconditional. In the case of US pollution liabilities, the uncertainty includes uncertainty in respect of future legislative and administrative reforms. The 'best estimate' of liabilities is based on an assumption that some such reforms will occur. This assumption is material in relation to the level of the reserve strengthening referred to above. This assumption is addressed in Chapter 6 and in the letter from Tillinghast set out in Appendix 4.

³⁴⁸ Every set of audited accounts of the Equitas group has been qualified. See recently for example Equitas Holdings RA fye March 31, 2002, p.35 ("Independent Auditor's report to the Members of Equitas Holdings Ltd."; June 18, 2002). *Ibid.*, p.35:-

8. In forming our opinion, we have considered the uncertainties, described in notes 1 and 2 to the financial statements, relating to the provision for claims outstanding of £7,763 million, reinsurers' share of claims outstanding of £1,142 million and reinsurance debtors of £923 million. Future experience may show material adjustments are required to these amounts particularly in respect of: (a) assumptions made in estimating provisions and the reliability of the underlying data upon which estimates are based; (b) the potential for unforeseen change in the legal, judicial, technological or social environment and the potential for new sources or types of claim to emerge; (c) assumptions in relation to expected interest yields and the timing of settlement of claims and reinsurance recoveries which influence the discount calculation; and (d) assumptions in relation to estimating the reinsurers' share of claims outstanding and the extent to which these and amounts due from reinsurers will be collected. 9. The potential adjustments referred to in paragraph 8, if adverse in the aggregate, could be material enough to exceed the amount of shareholders' funds at 31 March 2002 of £679 million.

See similarly recently for example Equitas Group RA fye March 31, 2001, p.40-41 ("Report of the Auditors to the Members of Equitas Holdings Limited"); Equitas Group RA fye March 31, 2000, p.28-29 ("Report of the Auditors to the Members of Equitas Holdings Limited"); Equitas Group RA fye March 31, 1999, p.27-29 ("Report of the Auditors to the Members of Equitas Holdings Limited"), which latter were further qualified (*ibid.*, p.28) in relation to information, explanations and accounting records:-

Limitations — 8. Underlying data, some of which was inherited from the Reserving Project, established by Lloyd's in connection with the Reconstruction and Renewal Plan, is not complete and accurate in all respects. 9. As a consequence, the evidence we considered necessary for our audit is not wholly available in respect of the following: (a) the provision for claims outstanding in respect of non-APH liabilities; (b) reinsurers' share of claims outstanding; and (c) exposure to individual reinsurers and consequently the appropriate level of bad debt provisions. 10. Had we been able to obtain all the evidence necessary to satisfy ourselves in respect of these matters we might have concluded that material increases or decreases are required to the relevant amounts included in the balance sheet. ... — Qualified opinion arising from uncertainties and limitations in our audit — 12. In respect alone of the limitations on our work described in paragraphs 8 and 9 above: (a) we have not obtained all the information and explanations that we considered necessary for the purpose of our audit; and (b) we were there-

serving Project were not³⁴⁹ necessarily consistent as between all EquitasRe-reinsured SYA participants.

sufficiency of Equitas Re's reserves

- 1.32 While self-regulators-at-Lloyd's have acknowledged³⁵⁰ that Equitas Re's relevant reserves were relatively small, the DTI expressed satisfaction³⁵¹ that its resources were adequate to pay all Eq-

fore unable to determine whether proper accounting records had been maintained. ... PricewaterhouseCoopers ... 20 July 1999.

See further for example Equitas Holdings RA fye March 31, 1998, p.4 (Chairman's statement):-

We have continued to experience difficulty with the data Equitas inherited from individual syndicates records and from the Lloyd's Reserving Project. ... [W]e hope that a considerable improvement in the quality of our data will be achieved in the current financial year. Meanwhile, our auditors have again qualified our accounts ... since they have difficulty with the data.

Independent Insurance Co. Ltd.'s recent insolvency has apparently been referred to UK criminal investigation authorities in connection with allegedly unquantifiable liabilities: see for example *Financial Times*, June 19, 2001 ("Independent faces fraud probe": ... Last month, Watson Wyatt, the company's external actuaries, discovered Independent faced unquantifiable losses [as has the Lloyd's enterprise since 1982: see *Lloyd's v Jaffray* {2a} CLC 725 (Cresswell J) ... from claims which had never been entered into its systems"). And see fortuitously *Financial Times*, June 20, 2001 ("Equitas set to fortify reserves").

- 349 See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.3: "We believe that the process followed in the allocation of the discounted Provision to the members is reasonable in relation to the stated objective of allocating the Provision, as discounted by the [Equitas Reserving] Project ..., albeit there are likely to be individual situations where such allocation is too high or low, perhaps materially, for a small number of members."

- 350 See for example *SOD*, p.141:-

Equitas Reinsurance and Equitas Limited are DTI authorised reinsurance companies and are subject to the regulatory framework for insurance business in the UK operated by the DTI. In authorising Equitas Reinsurance and Equitas Limited, the Minister for Trade noted that the "Government Actuary takes the view that there is a reasonable prospect that Equitas will be able to pay off its liabilities in full as they fall due". The level of Equitas' additional reserves is, however, small compared to that of ongoing insurance companies authorised in the UK and elsewhere that have written comparable exposures.

- 351 See for example *Hansard*, House of Commons, May 10, 1996, col. 297-298:-

Mr. John Greenway: To ask the President of the Board of Trade, pursuant to his answer to the hon. member for Bournemouth, West (Mr. Butterfill) on 29 March, *Official Report*, columns 762-64, what developments there have been since 29 March concerning Equitas; and if he will make a statement. **Mr. Nelson:** Since I announced the authorisation of Equitas on 29 March 1996, *Official Report*, columns 762-63, further work has taken place on the level of liabilities which Equitas will reinsure and on the assets available to cover them. As a result, the expected opening balance sheet of Equitas will be significantly stronger than originally foreseen, while the increase in provisions for 1992 and prior liabilities required will be about £1.2 billion rather than the £1.5 billion or more previously envisaged. These developments improve the prospects that Equitas will be able to pay off its liabilities in full as they fall due.

And see *ibid.*, March 26, 1996, col. 763-764:-

Mr. Butterfill: To ask the President of the Board of Trade if he has taken a decision under the Insurance Companies Act 1982 on the authorisation of Equitas; and if he will make a statement. [24286] **Mr. Nelson:** I have considered carefully the proposals made by Lloyd's for the authorisation of Equitas Reinsurance Ltd. and Equitas Ltd. ("Equitas"). Lloyd's proposes to reinsure the market's 1992 and prior non-life liabilities into Equitas, and to provide matching assets together with an additional solvency margin of free assets. Equitas would be a pure reinsurer, and Lloyd's application does not seek authorisation for it to undertake any subsequent business. Lloyd's proposals are based on a thorough review of the 1992 and prior liabilities and in particular of exposure to US asbestos and pollution claims. This review has been assisted by work undertaken by a number of leading firms of consulting actuaries and chartered accountants.

I have decided to authorise Equitas on the basis of Lloyd's proposals, subject to certain conditions which Lloyd's does not expect to fulfil before August this year. Of these, the most important are, first, that the contracts reinsuring names' liabilities into Equitas cannot be completed until Lloyd's can demonstrate that the assets available to Equitas are such as to ensure it has the minimum solvency margin I have required. Lloyd's statement of assets available to Equitas will be subject to independent review by Coopers and Lybrand, which is to be appointed as Equitas' auditors once the contracts are completed. Secondly, there are conditions to ensure that if developments between now and August should lead to an increase in the estimate of the overall level of liabilities, then a matching increase in the assets would have to be provided. In addition, there is a condition making any dividend to any shareholders or return premium to reinsured names subject to DTI consent. Any future proposal that Equitas should undertake further business would require DTI consent.

Under section 32 of the Insurance Companies Act 1982, UK insurance companies are required to maintain a minimum margin of free assets, calculated according to a formula. The formula was not devised with circumstances such as the Equitas proposal in mind, and is likely to produce widely fluctuating requirements over the first four years of Equitas' life. I have therefore decided to exercise the discretion to which I am entitled under the Act to make a direction under section 68 to modify the normal requirements in 1996 and 1998.

In reaching this decision, I have been mindful of my responsibilities under the Insurance Companies Act 1982 in relation to the authorisation of new insurance companies and the protection of policyholders in general. In this case, I have to consider whether policyholders would be better protected if Equitas is authorised than if it is not. I must also be satisfied that all the statutory requirements for authorisation under the Act have been met.

uitasRe-reinsured liabilities as they fell due. The amount and sufficiency of the EquitasRe-reinsurance premium was (to some extent) a commercial decision principally for Equitas Re.³⁵² For example: (1) neither AUA 9 nor any EquitasRe-reinsured SYA stamp's managing agency³⁵³ is liable to Equitas Re for quantifying EquitasRe-reinsured liabilities or for Equitas Re's own decision to assume them;³⁵⁴ (2) every EquitasRe-reinsured SYA participant agrees in RRC 4 (AUA 9 so agreeing on his behalf³⁵⁵) that his relevant managing agency is not liable to him in relation to either the acceptance of RRC 4's terms or the basis on which any EquitasRe-reinsured liabilities were valued (as at RRC 4's inception date);³⁵⁶ (3) Equitas Re is not liable to him in relation to such valuation.³⁵⁷ The RRC 1 Accepting Name similarly waives his relevant rights against Equitas Re.³⁵⁸ Various post-R&R English litigation on EquitasRe-reinsurance premium defects has all failed.³⁵⁹ Consideration of Equitas Re's current financial position is outside this Edition's scope.

The main reasons for my decision are as follows.

First, policyholders will benefit from substantial additional funds which would not otherwise be likely to be forthcoming. The provisions made for 1992 and prior liabilities have been increased by more than £1.5 billion. Equitas will be funded to meet its estimated liabilities and to provide the additional margin of free assets. Some £1 billion plus of the funding is to be provided from sources which have no obligation to support 1992 and prior losses, together with approaching a further £2.5 billion deriving from new money from names, the settlement of the current litigation and from 1993-94-95 profits which would not otherwise be necessarily or immediately available to support these losses. The Equitas proposals will also ensure that the assets to cover these provisions will be fully paid, in contrast to the present position in which some £4 billion of Lloyd's assets is represented by uncalled losses or unpaid cash calls. Furthermore, subject to the division of Equitas' assets between US, Canadian and UK trust funds, the assets of Equitas will be fully mutualised and all available to support all of Equitas' liabilities to policyholders.

Secondly, the creation of Equitas offers a strong prospect of lower claims handling costs and higher investment yields than would otherwise be the case, the benefits of which will accrue to policyholders in the first instance. Overall, I am satisfied that the resources available to support 1992 and prior policyholders through Equitas will be greater and more certain than without its authorisation. The Government Actuary takes the view that there is a reasonable prospect that Equitas will be able to pay off its liabilities in full as they fall due.

Thirdly, if, against expectation, the liabilities of Equitas at some future point should appear to be on the point of exceeding the assets available, arrangements will have been built into the reinsurance contract with names designed to ensure that policyholders would continue to receive an uninterrupted flow of claims payments, albeit at less than 100 per cent., with the residual balance of claims falling back on to the reinsured names. These arrangements would provide a much superior outcome for all policyholders, including reinsured names, than conventional insolvency proceedings for Equitas.

Fourthly, the creation of Equitas as proposed will very significantly improve the security of 1993 and subsequent policyholders at Lloyd's, by substantially removing the risk that further deterioration in the 1992 and prior liabilities would affect them.

Last, if Equitas does not proceed, Lloyd's has acknowledged that there is a significant risk that Lloyd's as a whole would have to cease underwriting. In that event, the subsequent run-off would face an uncertain future. I therefore consider Lloyd's proposals are a well-judged response to this situation in the interests of existing Lloyd's policyholders, and of reinsuring names as policyholders.

It is now for the members of Lloyd's to decide whether to support Lloyd's proposals as the next step before Equitas can go live later this year.

³⁵² See RRC 4, §3.11, heading "Underwriting decision".

³⁵³ No relevant managing agency was a party to RRC 4, hence RRC 4 was (partly for that reason) executed as a deed in order to extend the benefit of RRC 4, §3.11 to relevant managing agencies: RRC 4, recital (H).

³⁵⁴ RRC 4, §3.11(a). This is without prejudice to a managing agency's liability for the performance generally of RRC 2, RRC 8 or RRC 9: *ibid.* But see RRC 2, §1.9 (managing agency not liable to Equitas Re for setting the EquitasRe-reinsurance premium).

³⁵⁵ RRC 4, §3.11 ("It is expressly acknowledged and agreed ... (b) by the Substitute Agent on behalf of each Name...").

³⁵⁶ RRC 4, §3.11(b). *Cf.* the Accepting Name's comprehensive releases of his relevant managing agency at RRC 1. *Cf.* a managing agency's liability under a form of RRC 2, RRC 8 or RRC 9: *ibid.*

³⁵⁷ RRC 4, §3.11(c).

³⁵⁸ RRC 1, §4.7(a) *et seq.*, and *ibid.*, Sch. 1, definition of "Other Rights".

³⁵⁹ See for example *Price v Lloyd's* [2000] Lloyd's Rep IR 453 (Colman J); *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA); *Lloyd's v Leighs* [1997] CLC 1398 (CA).

EQUITAS LTD.***principal object; functions***

- 1.33** Equitas Ltd. (like Equitas Re) is authorised and regulated by the FSA as an insurance company.³⁶⁰ Its principal formal object is to “enter into and implement a retrocession contract³⁶¹ with Equitas Reinsurance Limited for the purpose of accepting the retrocession from Equitas Reinsurance Limited of that company’s underwriting liabilities and to enter into any collateral or ancillary arrangements relating thereto”.³⁶² Equitas Re’s³⁶³ consent is required for (among other³⁶⁴ things) Equitas Ltd. to engage in any business other than reinsurance company³⁶⁵ or to reinsure any liabilities other than from Equitas Re by way of retrocession.³⁶⁶ Equitas Ltd. is the Equitas Group’s “main operating company”³⁶⁷ or “principal operating company”.³⁶⁸ Its principal activities include³⁶⁹ inward claims management, run-off management and investment management. It aspires to run off the entire EquitasRe-reinsurance book of business as a single business with a consistent set of objectives, policies and strategies³⁷⁰ (its run-off functions are discussed elsewhere³⁷¹). Equitas Ltd.’s Articles of Association limit the principal of all money borrowed from third parties by Equitas Ltd. and its subsidiaries to a total of £1bn.³⁷²

share capital; ordinary shares only

- 1.34** Equitas Ltd. is a company incorporated in England and Wales whose assets, and its regulatorily permitted capability to discharge its liabilities, need be (specific insurance regulation aside) no more than its paid-up authorised-and-issued share capital. Equitas Ltd.’s authorised share capital is £1,000m in the form of 1,000m £1 shares,³⁷³ of which 780,000,001 have been issued (as envisaged in RRC 4³⁷⁴) exclusively to Equitas Re.³⁷⁵ At company general meetings³⁷⁶ the share-

³⁶⁰ See p.26.

³⁶¹ *Viz.*, RRC 5: see Appendix 1.3.

³⁶² March 8, 1996 Memorandum of Association, §3(a). And see *SOD*, p.82.

³⁶³ Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §2, definition of “Shareholder”.

³⁶⁴ See full list at Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §17(a)-(h).

³⁶⁵ Equitas Ltd. September 2, 1996 Arts. of Assn. (as amended by May 1, 2001 sole member’s written resolution), §17(b).

³⁶⁶ Equitas Ltd. September 2, 1996 Arts. of Assn. (as amended by May 1, 2001 sole member’s written resolution), §17(c).

³⁶⁷ *SOD*, p.82 (“Equitas Limited ... will be the main operating company in the Equitas Group responsible for the run-off of the 1992 and prior business”).

³⁶⁸ *SOD*, p.84 (“Equitas Limited will be the principal operating company of the Equitas Group”).

³⁶⁹ See generally *SOD*, p.84-88.

³⁷⁰ *SOD*, p.84. In so doing, it will have regard to individual EquitasRe-reinsured SYA participants’ individual liabilities only where necessary, for instance, for the purpose of reinsurance recoveries: *ibid.*

³⁷¹ See Chapter 2.

³⁷² Equitas Ltd. September 2, 1996 Arts. of Association (as amended by May 1, 2001 sole member’s written resolution), §58.2.

³⁷³ March 8, 1996 Memorandum of Association, §5; Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §4. For incidents, see *ibid.*, for example §§8.2 (preemption), 9 (dilution), 10 (fractions).

³⁷⁴ See RRC 4, Sch. 5, §5:-

The Board of ERL have resolved that the amount of £710,000,000 being mutual surplus of ERL of its initial period of underwriting shall be applied in making a contribution, in the form of a subscription for shares on the terms specified in the Subscription Agreement, to the capital of Equitas, the Board of ERL being satisfied that such a contribution is necessary to secure or maintain the authorisation of Equitas by the DTI and that the reinsurance to be provided by Equitas under the Retrocession Agreement is on terms which confer rights on ERL which secure benefits for ERL suitable for the protection of the rights of Names under this schedule. Accordingly, such surplus of £710,000,000 shall not be subject to the operation of the other provisions of this schedule.

³⁷⁵ Equitas Ltd.’s December 11, 2001 363s annual return as at December 5, 2001, Section 3 (“Share Capital”) and Section 4 (“Details of Shareholders”). For capital issuance history, see prior annual returns; Equitas Ltd. G88(2) filing, September 10, 1996; September 11, 1997 Record of [September 2, 1996] Decision[s] filed at Companies House by Equitas Ltd., §(iv)

holder has one vote³⁷⁷ for each paid up³⁷⁸ share. Equitas Ltd.’s Articles of Association contain restrictive provisions concerning the payment of a dividend by Equitas Ltd. to the ordinary shareholder.³⁷⁹

board

- 1.35** Equitas Ltd.’s board is required to be identical to Equitas Re’s board.³⁸⁰ An Equitas Ltd. director is disqualified from voting if he has a material interest in relation to a resolution concerning (among other³⁸¹ things) matters concerning any “reinsurance contract between any syndicate at Lloyd’s of which he is a member and the Company”;³⁸² or, if he happens to be a RRC 4 “Name” or *ibid.* “Closed Year Name”, in a matter the proposed outcome of which will be to treat him differently to others in the same category.³⁸³

EQUITAS POLICYHOLDERS TRUSTEE

principal object

- 1.36** Equitas Policyholders Trustee is a trust corporation wholly owned by Equitas Holdings. It does not own Equitas Holdings and is not to be confused with the seven unincorporated EquitasRe-reinsurance Trustees³⁸⁴ who jointly do.³⁸⁵ Its principal constitutional object is to “carry on business as a trust corporation, that is to say, a corporation for the time being entitled by rules under the Public Trustee Act 1906 to act as a custodian trustee, or entitled pursuant to any successor legislation or comparable legislation applicable to a trustee in any other jurisdiction to carry out the functions, business, and activities of a custodian trustee, and to undertake trust business generally.”³⁸⁶ As RRC 4, §4 assignee, it controls Equitas Re’s performance of *ibid.*, §3.4.³⁸⁷

activities

- 1.37** As the assignee³⁸⁸-trustee³⁸⁹ of each EquitasRe-reinsured SYA participant’s relevant RRC 4 rights against Equitas Re,³⁹⁰ the company exercises its various RRC 7 trust³⁹¹ obligations princi-

and (v). Equitas Re subscribed to one ordinary share on incorporation: March 8, 1996 Memorandum of Association, p.5, subscription declaration. And see RRC 4, Sch. 2, §1 definition of “Subscription Agreement”.

³⁷⁶ See generally Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §18 *et seq.*

³⁷⁷ Equitas Ltd. September 2, 1996 Articles of Assn. (as amended by May 1, 2001 sole member’s written resolution), §39.

³⁷⁸ Equitas Ltd. September 2, 1996 Articles of Assn. (as amended by May 1, 2001 sole member’s written resolution), §42.

³⁷⁹ Equitas Ltd. September 2, 1996 Articles of Assn. (as amended by May 1, 2001 sole member’s written resolution), §91.

³⁸⁰ Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §54(d) (“The board shall exercise the powers of the Company as shareholder in Equitas Limited so as to ensure that the composition of the board of Equitas Limited and the composition of the board of the Company are identical”); Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §52 (“The board will appoint as directors of the Company those persons who are directors of the Shareholder and shall remove them if they cease to be directors of the Shareholder”) read with *ibid.*, §2 definition of “Shareholder”. On compulsory vacation of office on the director ceasing to be an Equitas Re director, see *ibid.*, §59. And see, as to mere number of directors, *ibid.*, §51 (“The number of directors shall be the same as the number of directors of the Shareholder from time to time”).

³⁸¹ See Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §79(a)-(g) for the full list.

³⁸² Equitas Ltd. September 2, 1996 Arts. of Association (as amended by May 1, 2001 sole member’s written resolution), §79(f).

³⁸³ Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §79(g).

³⁸⁴ See p.15.

³⁸⁵ See p.20.

³⁸⁶ Equitas Policyholders Trustee August 23, 1996 Memorandum of Association, §3(a).

³⁸⁷ See RRC 4, §4.5.

³⁸⁸ See generally RRC 4, §4.1; *SOD*, p.98.

pally in order to advance and protect the relevant interests of EquitasRe-assureds-at-Lloyd's as a class.³⁹² Its RRC 7 roles include (for example) policing Equitas Re's payouts regardless of the latter's insolvency;³⁹³ in the event that Equitas Re does sustain an "Insolvency Event",³⁹⁴ marshalling and protecting "Trust Property"³⁹⁵ and distributing it to EquitasRe-assureds-at-Lloyd's;³⁹⁶ and distributing any surplus to EquitasRe-reinsured SYA participants.³⁹⁷ Self-regulators-at-Lloyd's (who have a role in Equitas Re through the "Lloyd's Director"³⁹⁸) do not expect Equitas Policyholders Trustee to ordinarily have an "active role";³⁹⁹ it is presently considered dormant.⁴⁰⁰ Other than in various circumstances (which have not yet come to pass) envisaged at RRC 7, §2,⁴⁰¹ the company has no active role in paying claims.⁴⁰²

share capital; ordinary shares only

- 1.38** Equitas Policyholders Trustee is a company incorporated in England and Wales whose assets, and its regulatorily permitted capability to discharge its liabilities, need be no more than its paid-up authorised-and-issued share capital. Its authorised share capital is £100 in the form of one voting⁴⁰³ £100 share,⁴⁰⁴ issued to (and the original subscriber was) Equitas Holdings,⁴⁰⁵ which has given formal approval for the company to enter into whatever contracts its board thinks appropriate.⁴⁰⁶ Accounts are not laid before the company's member in general meeting.⁴⁰⁷

389 See generally RRC 7, §2.1 *et seq.*

390 See p.26.

391 See RRC 7, §2.1 *et seq.*

392 *SOD*, p.82.

393 See p.224.

394 See p.224.

395 See p.226.

396 See p.226.

397 See p.227.

398 See p.22.

399 See generally for example *SOD*, p.82:-

Equitas Policyholders Trustee limited will act as trustee of rights of Names under the Reinsurance Contract (other than the rights to return premiums and rights to certain other payments) which it will hold for the benefit of underlying policyholders. Equitas Policyholders Trustee will not have an active role in the payment of policyholders' claims in the ordinary course of business, nor in circumstances where proportionate cover is invoked. However, if any insolvency procedure in relation to Equitas were invoked, Equitas Policyholders Trustee would be entitled to prove in the insolvency and would distribute any funds it received among policyholders on a pro rata basis.

And see *ibid.*, *SOD*, App. 5, p.3-4:-

[1.14] It is expected that, provided Equitas Reinsurance properly complies with its reinsurance obligations, Equitas Policyholders Trustee will not have an active role in the payment of policyholders' claims in the ordinary course of business nor in circumstances where a proportionate cover plan is implemented. However, if any insolvency procedure were to be invoked in relation to Equitas, Equitas Policyholders Trustee would prove in the insolvency and would distribute any funds it received among policyholders on a pro rata basis. The underlying policyholders should therefore receive the same amount that they would have received if Names had proved individually and paid their underlying policyholders out of the proceeds. [1.15] After Equitas Policyholders Trustee has distributed in full to all underlying policyholders, any surplus (assuming underlying liabilities have been met in full) would be paid to Names by way of return premium. Such amounts will be payable to premiums trust funds, unless the relevant premiums trust deeds have expired. In the case of Names who have ceased underwriting and have no further insurance creditors, such amount will be released to Names.

400 Equitas Policyholders Trustee September 19, 1997 special resolution "THAT, having satisfied the provisions of Section 250 of the Companies Act 1985 relating to dormant companies, the Company be exempt from the obligation to appoint Auditors as otherwise required by Section 384 of that Act".

401 See p.A140 *et seq.*

402 *SOD*, p.82.

403 Equitas Policyholders Trustee August 23, 1996 Articles of Association, §8.

404 Equitas Policyholders Trustee August 23, 1996 Memorandum of Association, §5.

405 Equitas Policyholders Trustee August 23, 1996 Memorandum of Association, p.5, subscription declaration; Equitas Policyholders Trustee August 11, 1997 annual return (form 363s).

406 "Record of decision of the sole member", September 11, 1996, recording Equitas Holdings' September 2, 1996 decision:-

directors

- 1.39 Equitas Policyholders Trustee uses “director” imprecisely.⁴⁰⁸ Authentic directors are appointed by Equitas Holdings,⁴⁰⁹ which is empowered to appoint anyone to be any sort of director.⁴¹⁰ As at the last public filing, Equitas Policyholders Trustee had two directors, viz., Equitas Holdings’ CEO and the latter’s finance director.⁴¹¹ There is no express requirement that Equitas Policyholders Trustee’s board be identical to Equitas Holdings (and therefore⁴¹² Equitas Re or Equitas Ltd.) boards. The board is empowered to delegate to a committee.⁴¹³

EQUITAS MANAGEMENT SERVICES LTD.

- 1.40 Described⁴¹⁴ as the principal employer within the Equitas Group, Equitas Management Services provides to Equitas Ltd. its employees’ services, together with premises, facilities, information technology and other services.⁴¹⁵ Its ordinary shares are wholly owned⁴¹⁶ by Equitas Holdings.

The Company has received a notice from its sole member, Equitas Holdings Limited (EHL), of the following decision made on 2 September 1996 (taking effect as if it was a special resolution of the Company): THAT EHL approves the proposal for the Company to enter into such agreements as the Board of directors of the Company think appropriate, in such form as the Company or any duly authorised director of the Company shall, approve, together with any other necessary or desirable agreements or arrangements (including all ancillary deeds, documents or instructions), in each case in such form as the Company or any duly authorised director of the Company shall approve, including but not limited to: (i) the Reinsurance Contract [RRC 4]; and (ii) the External Trust Deed [RRC 17].

The comma after “shall” is per the original. And see Equitas Policyholders Trustee August 23, 1996 Articles of Association, §13 (“Matters requiring consent of the Shareholder”).

⁴⁰⁷ Equitas Policyholders Trustee September 19, 1997 elective resolution.

⁴⁰⁸ Equitas Policyholders Trustee August 23, 1996 Articles of Association, §15. *Ibid.*: “The inclusion of the word director in the designation or title of any such office or employment shall not imply that the holder is a director of the Company, nor shall the holder thereby be empowered in any respect to act as, or be deemed to be, a director of the Company for any of the purposes of the articles”.

⁴⁰⁹ Equitas Policyholders Trustee August 23, 1996 Articles of Association, §16(1) (“While the company is a subsidiary, the company’s immediate holdings company may appoint any person to be a director or remove any director from office”).

⁴¹⁰ Equitas Policyholders Trustee August 23, 1996 Articles of Association, §16(1).

⁴¹¹ Equitas Policyholders Trustee’s August 29, 2001 363s annual return as at August 23, 2001, Section 2 (“Details of Officers of the Company”).

⁴¹² See pp.28, 40.

⁴¹³ Equitas Policyholders Trustee August 23, 1996 Articles of Association, §14.

⁴¹⁴ *SOD*, p.82.

⁴¹⁵ See generally for example *SOD*, p.82:-

Equitas Management Services Limited is a management services company which will be the principal employer within the Equitas Group. It will provide the services of its employees, together with premises, facilities, information technology and other services, to Equitas Limited. Its constitution will not permit it to provide services to third parties.

On personnel, see also for example *ibid.*, p.92, envisaging around 500 employees:-

The Equitas Group will initially have approximately 500 employees, including approximately 100 in the Equitas Claims Unit and approximately 300 in Run-off Management. ... The corporate culture will emphasise individual performance and achievement and performance-related pay will be an integral part of the proposed remuneration programme.

The 500 does not include personnel of Equitas Ltd. subcontractors.

⁴¹⁶ Equitas Management Services 363s December 11, 2001 annual return as at December 5, 2001, Section 4 (“Details of Shareholders”) read with *ibid.*, Section 3 (“Share Capital”).

2: Functions

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EQUITAS RE'S TWO CAPACITIES

*orientation***summary**

- 2.1 In handling claims, Equitas Re acts both on its own behalf as RRC 4, §3 FSA-approved-and-regulated reinsurer principal, and also on behalf of relevant EquitasRe-reinsured SYA participants as (substantially unregulated) *ibid.*, §9 run-off agent. Plaintiff EquitasRe-assureds-at-Lloyd's have argued¹ that Equitas Re performs its RRC 4, §9 run-off agency functions neither as agent nor merely "as if it were principal"² but actually as a principal; defendant Equitas Re appears to have argued that being a run-off agent precludes it from being an assumption reinsurer; and various³ courts appear to have held that Equitas Re is an assumption reinsurer, or real party-in-interest, because it is a RRC 4, §9 run-off agent. Each argument contains a *non sequitur* and suggests misunderstanding⁴ of Equitas Re's two distinct, wholly overlapping (and so singularly juxtaposed⁵) roles.

Equitas Re's approach to its functions

- 2.2 In its "mission statement", Equitas Holdings claims two "clearly defined objectives which govern our philosophy and business strategy": to try to secure genuine finality for EquitasRe-reinsured SYA participants (the need for which in the first place appears to be based on a misconception⁶), and to try to generate sufficient surplus to enable some EquitasRe-reinsurance premium to be returned to them⁷ (which can be done only after the payment of all EquitasRe-reinsured liabilities⁸). Equitas Holdings has indicated that the Equitas enterprise aims to be an "open and responsive group; to operate to high standards of corporate governance and commercial practice; to assemble a professional group of people who share common objectives; and to recognise our responsibilities to all our constituencies",⁹ and that it anticipates adopting "creative

¹ See for example *Employers Insurance of Wausau v Certain London Market Companies*, 1997 WL 1134980 (W. D. Wis.) at *4:-

Plaintiff ... believes that the Reinsurance and Run-Off Contract ... is much more than a typical reinsurance contract Instead, plaintiff contends, Equitas has taken control over all aspects of the Names' pre-1993 obligations Indeed, plaintiff characterizes the agreement between Equitas and the Name not as a reinsurance contract ... but rather as an "assumption agreement." As factual support for this theory, plaintiff notes that the Names granted Equitas exclusive power to address the 1993 obligations, particularly the power to litigate any claims related to the obligations.

Such matters are not and never have been ordinarily in the control of any SYA participant, but are within the scope of his managing agency. As judicially summarised, the argument, which contains a number of *non sequiturs*, suggests misunderstanding of elementary managing agency functions at Lloyd's.

² RRC 4, §9.4.

³ *Central Maine Power Co. v Moore*, No. CV-93-489 (Me. Super. Ct., Kennebec Cty. May 16, 1999), slip op., p.2 ("Equitas has become the real party-in-interest Equitas is not simply funding or reimbursing the Names for claims paid, but are completely in charge of the administration and litigation of those claims"). For apparent similar confusion, see for example *Employers Mut. Cas. Co. v Owens Ins., Ltd.*, No. MRS-C-51-96 (N.J. Super. Ct., Morris Cty. April 12, 1999), slip op., p.15-17.

⁴ And see for example *NAIC Review 1999*, p.35: "Equitas continues its function as a run-off company of coverage underwritten at Lloyd's pre-1993. The potential exists for Equitas to not have current assets to pay ultimate liabilities and that shortfall to eventually financially impact Lloyd's and/or its Members. For that reason the run-off of Equitas remains of interest."

⁵ Before RRC 4, §9, a SYA participant's run-off agent was never also his outward reinsurer. Conventionally at Lloyd's, a SYA participant's run-off agent is not his reinsurer or *vice versa*: the managing agency of participants on a particular SYA contracts to perform run-off (among other) agency functions but at no time acts as their reinsurer, and has no personal interest, whether as reinsurer or novatee, in the outcome of, nor any personal liability to discharge, any SYA participant's insurance liability, and never uses its personal assets to do so.

⁶ See p.165.

⁷ Equitas Holdings RA fpe September 4, 1996, p.2 (Chairman's Statement). *Ibid.*:-

"Given the structure of our opening balance sheet and the inherent uncertainties in the book of business we have taken over, neither will be easy. Nonetheless, all our energy and skills will be directed towards achieving these objectives consistent with our obligations to claimants.

⁸ See generally RRC 4, Sch. 5.

⁹ Equitas Holdings Ltd. RA 1996, p.3 (Chairman's Statement).

and innovative approaches in performing each of its core activities".¹⁰ Equitas Re particularly aims to "achieve long-term security for all stakeholders by demonstrating world-class capability for innovation and effective management of claims, recoveries, investment assets and operating processes."¹¹

logistics

- 2.3 Run-off management at Equitas Re is a considerable administrative task,¹² including dealing with "[w]ell over 250,000 reinsurance policies written by 3,000 reinsurers — Simultaneous acquisition of more than 90 independent businesses — More than 400 million pages of paper documents, enough to stretch 3 times around the globe at the Equator".¹³ Attendant internal¹⁴ administrative procedures were initially cumbersome.¹⁵ "Equitas" employs more than six hundred people.¹⁶ The Equitas enterprise has "matured into an organisation with clearly focused priorities, [and] well-defined strategies".¹⁷ Equitas Re's controls¹⁸ include periodically assessing

¹⁰ Equitas Holdings RA fpe September 4, 1996, p.9 (Chief Executive Officer's Review). *Ibid.*: "To be successful Equitas must significantly change the environment in which it operates, an environment that led in part to the losses that necessitated the creation of Equitas."

¹¹ Equitas Holdings RA fpe September 4, 1996, p.9 (Chief Executive Officer's Review); *Reducing uncertainty — reserving issues in the 21st century — Equitas — managing long-tailed risks, May 12, 2000, Paul Jardine, Commutations Director & Chief Actuary, Equitas Limited*, fourth unnumbered slide "Mission statement".

¹² See for example Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal* 1998, p.62 *et seq.* *Ibid.*, p.62-3:-

Equitas reinsured more than 750 open years of account written by more than 390 different syndicates which were managed by some 90 different managing agencies. This means that we have inherited more than 750 different trading years as well as more than 750 separate reinsurance programmes which are composed of more than 220,000 different reinsurance policies written by nearly 3,000 reinsurers. We have assumed the business of 390 entities that had differing underwriting strategies and brought together 90 different business cultures.

See similarly Moser, Mealey's Seminar Friday 16th November 2001 — Presentation By Scott Moser Equitas Claims Director at *Mealey's Litigation Report: Insurance*, December 11, 2001, p.27, 28:-

Equitas is the product of the largest series of reinsurance transactions in history. Equitas was funded with nearly \$19 billion in premiums; Equitas reinsured risks written by 390 different Lloyd's syndicates. These syndicates were managed by some 90 different managing agencies. The Equitas transaction encompassed more than 750 separate reinsurance programmes, which are composed of more than 220,000 different reinsurance policies written by nearly 3,000 reinsurers. As run off agent for the Names, Equitas is dealing with thousands of claims.

And see *Reducing uncertainty — reserving issues in the 21st century — Equitas — managing long-tailed risks, May 12, 2000, Paul Jardine, Commutations Director & Chief Actuary, Equitas Limited*, sixth unnumbered slide "Background to Equitas and its financial position": "5-10% largest claims produce 60%-90% of estimated ultimate losses — Smallest 500 reinsurers owe £8m in aggregate — 5% of reinsurance transactions account for around 95% of the total value — 10 reinsurers (out of 3000) account for 30% of total recoverables — 20 brokers placed 80% of the reinsurance recoverable".

¹³ *Reducing uncertainty — reserving issues in the 21st century — Equitas — managing long-tailed risks, May 12, 2000, Paul Jardine, Commutations Director & Chief Actuary, Equitas Limited*, fifth unnumbered slide "Size of the task".

¹⁴ On infrastructure at Equitas Re, see for example *One Lime Street*, September 1996, p.16 ("Equity between interests"), interview with Equitas Holdings then chairman:-

"[N]o frills, no marble palaces for officers, but we won't be in a dog kennel either. We will use what is appropriate to achieve the kind of image that we are trying to project and that is of good value for money, consistent with the efficiency of the business and the effectiveness of this operation".

¹⁵ *Insurance Day*, March 26, 1998, p.6 ("Equitas focuses on the larger issues"), article by Equitas Ltd.'s CEO:-

Our processing stream is, on the face of it, both unnecessarily complicated and very expensive. Currently, an Equitas claims adjuster, either an employee or someone working by contract under our direction, agrees a claim with a broker. The broker takes the claim to the Lloyd's Claims Office who then turns around and notifies the claim back to each Equitas syndicate on the risk. Often information detailing the claim is insufficient for processing against reinsurance programmes Each syndicate manager then has to clean up the data before it can be entered into the system and the reinsurance identification and collection process can begin.

¹⁶ Equitas Holdings RA fye March 31, 2002, p.10 (Chief Executive Officer's review):-

The average number of employees decreased to 660 in the year ended 31 March 2002 (2001: 739). This reduction in headcount takes into account the full effect of our decision to outsource information technology, facilities management and records management functions in the year ended 31 March 2001, although that reduction was somewhat offset by an increase in the number of reinsurance recovery employees due to the consolidation of this function in-house on 1 April 2001.

¹⁷ Equitas Holdings RA fye March 31, 2002, p.10 (Chief Executive Officer's review).

¹⁸ Equitas Holdings RA fpe September 4, 1996, p.14 (Financial Review) referring to a "system of controls ... to identify any circumstances which would give rise to unacceptable business and financial risks so that appropriate management actions can be taken to monitor and minimise their effects".

claims, associated reinsurance recoveries¹⁹ and commutations by major category and currency against reserves held.²⁰ Equitas Re has done “substantial re-engineering” of its (to some extent inherited²¹) operations, focusing on proper presentation of data by the Lloyd’s broker; creation of a quality-control “front desk”; centralisation of credit control; and centralised claims validation.²²

Equitas Re: some features and their origins

Equitas enterprise feature	origin
reinsurance of EquitasRe-RTCed SYA participants (RRC 4, §3)	Lloyd’s enterprise’s SYA participants
EquitasRe-RTCed SYA participants’ SYAs (RRC 4, Sch. 1)	Lloyd’s enterprise’s SYAs
run-off management (RRC 4, §9)	managing agencies at Lloyd’s
EquitasRe-RTC premium (RRC 4, §5 etc.)	function not of the assets required to meet liabilities but of the assets available at the time of and as a result of the manipulations of R&R

¹⁹ SOD, p.86:-

Run-off Management will deal with a broad range of matters relating to reinsurance and will be responsible for monitoring and maximising inwards cash flows. It will handle the calculation of reinsurance recoveries and collection of recoveries due, deal with outward settlements, offsets or other special arrangements, and be responsible for reviewing reinsurer security.

²⁰ Equitas Holdings RA fpe September 4, 1996, p.14 (Financial Review). *Ibid.*:-

New types of claims and any changes in settlement trends will be examined carefully and their impact on reserves evaluated. The Chief Actuary joined the Group on 1 December 1996 to lead this important function. Other financial risks include counterparty risk such as amounts due from reinsurers, balances at bank and obligations of specific issuers. This risk is managed by regular review and assessment of relevant balances against established criteria.

²¹ SOD, p.86:-

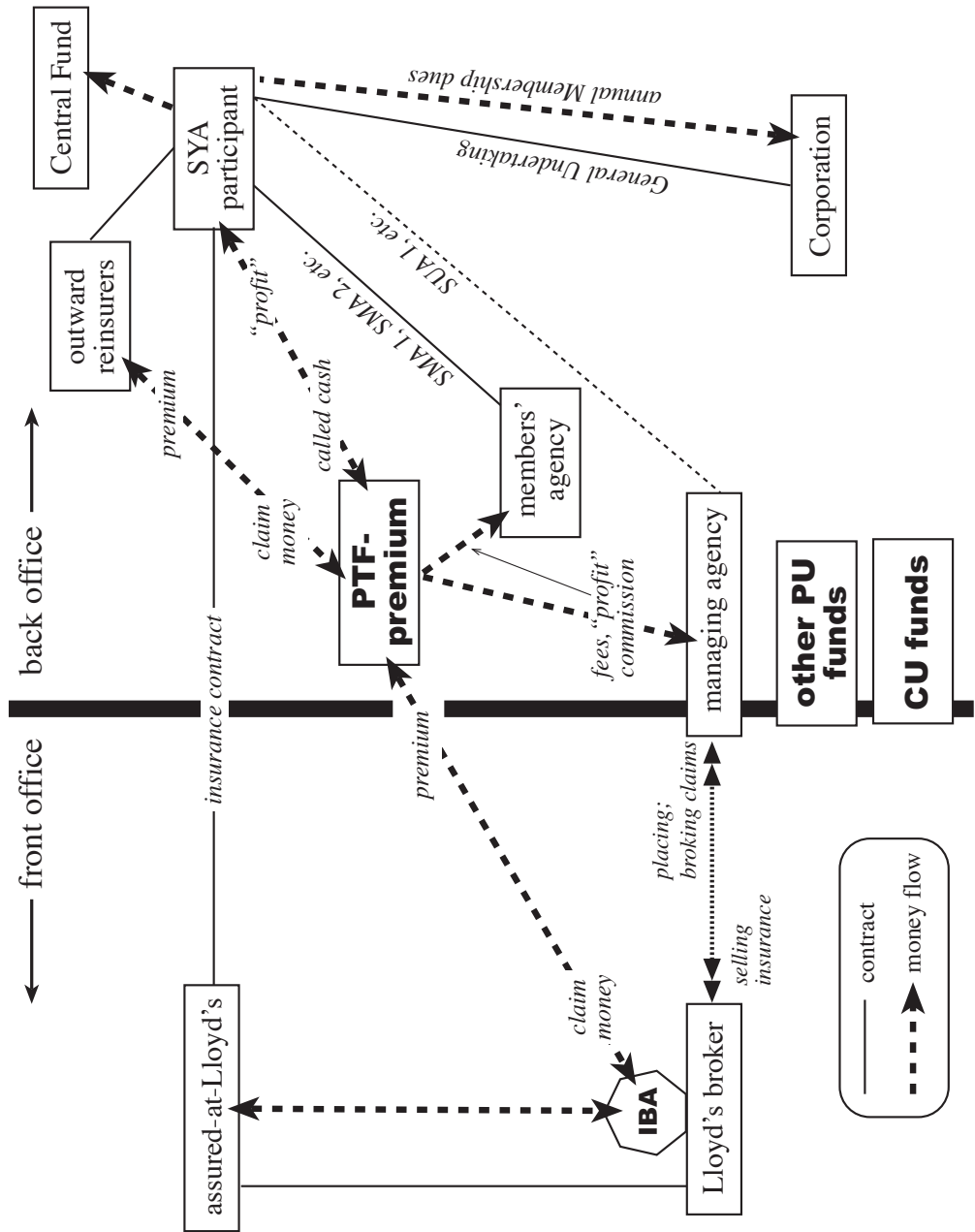
The Equitas Group will acquire the 1992 and prior run-off business of Syndicate Underwriting Management limited (SUM), a specialist run-off company owned by Lloyd’s. SUM was formed in 1987 to act as manager of Lioncover. It has provided its run-off and specialist claims administration services to other Lloyd’s syndicates and managing agents and in January 1996 it merged its business with that of two other run-off companies: Sturge Insurance Services Limited and Run-Off Syndicates Limited. The SUM business to be acquired by Equitas will provide the core in-house run-off capability of Equitas.

See historically for example Market Bulletin X666, January 19, 1995 (“Prep[a]ration for Equitas”):-

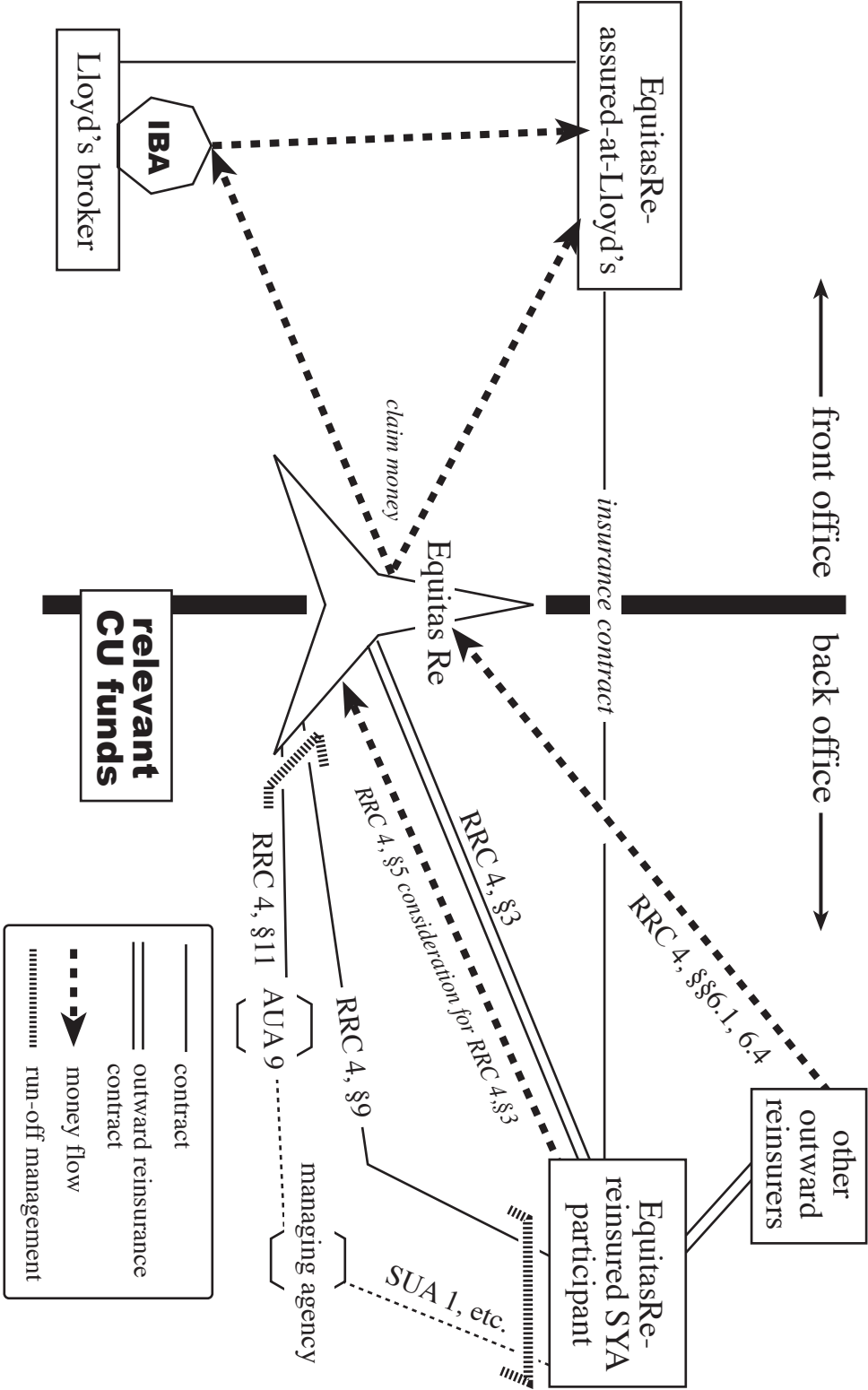
In preparing for Equitas to be established as a fully operational company on 1st January 1996, the Market Board has been considering proposals to achieve an appropriate and credible structure to support its needs from that date. As part of these plans it has been decided that: Syndicate Underwriting Management Limited (SUM) will be sub-divided into two areas of activity. It will continue to operate as a separately constituted managing agent to provide executive run-off functions for Lioncover and for other syndicates which remain under its management whilst not reinsured into Equitas. SUM’s other activities, namely its insurance, administration and processing functions, will become the nucleus of the Equitas in-house operations structure. The support for these functions, in finance, systems development, computer operations, personnel and building services, will also merge with Equitas. In addition, the Specialist Claims Unit (SCU) will be merged with Equitas and will form the core of the Equitas’ claims adjusting and agreement department. These decisions, together with the plans for approving run-off companies being announced separately, will provide the framework within which detailed planning of any further resource needs of Equitas can be completed. Through these detailed plans, Equitas will also develop an overall migration strategy for its run-off administration. The migration strategy will be designed to achieve the successful and orderly transfer of all syndicates’ run-off administration into either Equitas or approved run-off companies, once liabilities have been reinsured by Equitas.

²² *Insurance Day*, Match 26, 1998, p.6 (“Equitas focuses on the larger issues”), article by Equitas Ltd.’s CEO.

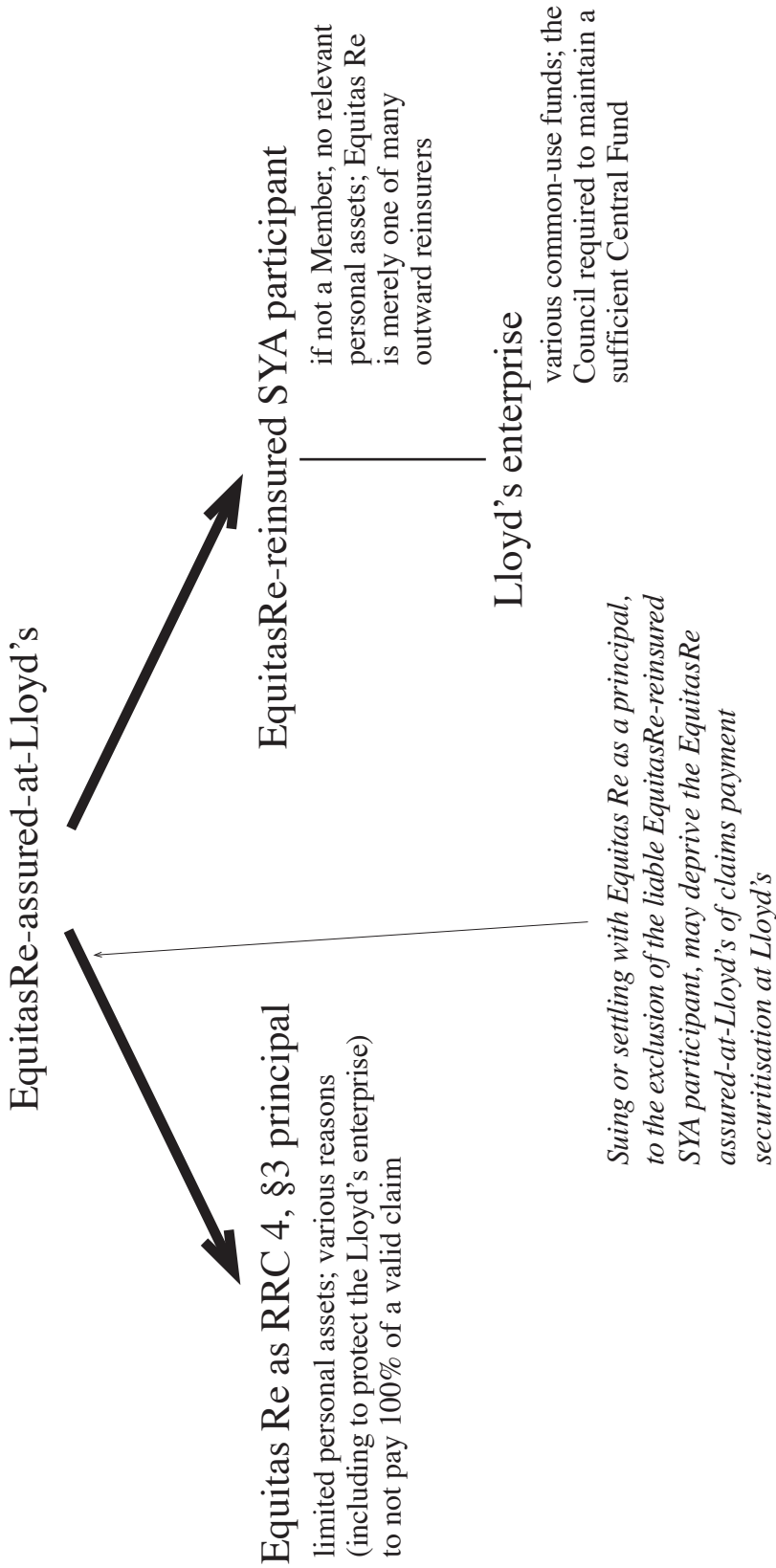
front office and back office at Lloyd's I: ordinarily (simplified)



front office and back office at Lloyd's II: after RRC 4 (simplified)



treating with Equitas Re as a principal: basic financial dynamic



Equitas Re is a principal

- 2.4 Largely a reprise (without the express Corporation indemnities²³) of Lioncover and Centrewrite, Equitas Re is a reinsurance company principal which has sold the RRC 4, §3 product to each EquitasRe-reinsured SYA participant. Its memorandum of association implicitly empowers it to make its own claims handling and other relevant insurance business decisions on its own behalf, in relation to its own personal assets and to the trust and other assets under its control, ultimately for the benefit (in principle) of its shareholder.²⁴ Externally regulated by the FSA as a conventional insurance company, Equitas Re is bound to observe relevant insurance company claims handling rules²⁵ (an obligation absent were Equitas Re only a mere RRC 4, §9 run-off agent). There appears to be no reason in principle why as RRC 4, §3 reinsurer Equitas Re should not be susceptible to a well-founded assumption reinsurance argument (assuming that it is in the EquitasRe-assured's-at-Lloyd's interest to make it). Whether reinsurance²⁶ or RTC,²⁷ the RRC 4, §3 product emanates from Equitas Re as mere reinsurer principal, not²⁸ as novated²⁹ insurer or as managing or run-off agent.³⁰

***Equitas Re is an agent
performance generally***

- 2.5 Equitas Re is the compulsory,³¹ irrevocable,³² personal, direct,³³ comprehensively empowered³⁴ RRC 4, §9 run-off agent³⁵ of each individual³⁶ EquitasRe-reinsured SYA participant, and performs its attendant functions ultimately for its principal's benefit. In conducting its RRC 4, §9 run-off agency business — which it conducts simultaneously with and separately from, and in

²³ See p.139.

²⁴ See p.28.

²⁵ See p.71.

²⁶ See p.149.

²⁷ See p.151.

²⁸ Self-regulators-at-Lloyd's considered and rejected express novation to Equitas Re: see for example *SOD*, p.115:-

A possible alternative means of achieving finality considered, and ultimately rejected, by Lloyd's was a statutory transfer (or 'novation') of Names' obligations to policyholders from Lloyd's to Equitas Reinsurance. Such a form of transfer may be effected under section 85 and Schedule 2C of the Insurance Companies Act, with the consent of the DTI. As such a transfer would, if available, operate as a novation it would provide a complete release of Names from their obligations to policyholders. Lloyd's explored the use of a statutory novation in detail but was obliged to conclude that the relevant statutory provisions could not be made to operate. In particular, such a transfer would not effect the transfer of the benefit of Names' reinsurance which would be fundamental to reinsurance to close of Names' liabilities. In order to transfer the benefit of such reinsurance to Equitas Reinsurance, it would have been necessary to obtain the separate consent of each reinsurer to the proposed transfer to Equitas Reinsurance (which was not feasible given the thousands of reinsurers that would have been involved). In addition, insurance laws throughout the US permit novations to occur only if the regulator orders it in the context of a rehabilitation or liquidation proceeding, or with the express consent of all of the policyholders. Lloyd's was, therefore, forced to reject a statutory transfer as a means of achieving the reinsurance into Equitas.

Cf. the recent express novation from the 9001-1987 stamp to Lioncover.

²⁹ There has been no express novation of any relevant insurance contract away from any EquitasRe-reinsured SYA participant to Equitas Re. Nor is RRC 4 capable of giving rise to a novation-by-usage argument *Cf.* the novation-by-custom arguably inherent in conventional RTC.

³⁰ See RRC 4, §9 and this page.

³¹ See RRC 4, §9.1.

³² See RRC 4, §9.1 ("... irrevocably appoint ..."); *ibid.*, §9.2 ("... irrevocable authority ..."); *ibid.*, §9.4 ("... irrevocable ... power ...").

³³ Under RRC 4, §9.1, each EquitasRe-reinsured SYA participant directly appointed Equitas Re as his run-off agent; the appointment was not made by AUA 9. *Cf. ibid.*, §11.1 (transitionally, AUA 9 appoints Equitas Re).

³⁴ See the full list of Equitas Re's powers at RRC 4, §9.2.

³⁵ See generally RRC 4, Part II ("Run-off of the reinsured accounts"). See particularly *ibid.*, §9.1. The agency provision is at *ibid.*, §9.2. In its early operation, Equitas Re created a Run-Off Management Division: see contemporaneously for example Market Bulletin Y176, March 25, 1996 ("Equitas organisation — run off management").

³⁶ There is no substance to the notion that Equitas Re is the agent of any syndicate properly so called. *Cf.* for example Mealey's Seminar Friday 16th November 2001 — Presentation By Scott Moser Equitas Claims Director at *Mealey's Litigation Report: Insurance*, December 11, 2001, p.27, 28: "Equitas reinsured risks written by 390 different Lloyd's syndicates". Syndicates do not sell insurance. Nor do SYAs.

relation to exactly the same liabilities as are the subject of, its RRC 4, §3 reinsurance business — Equitas Re is under various express contractual obligations³⁷ to each EquitasRe-reinsured SYA participant, including to discharge its RRC 4, §9 run-off agency functions with all reasonable skill, care and diligence,³⁸ and to operate its business and conduct its affairs “in a bona fide and businesslike manner”.³⁹

RRC 4, §9 functions derive from managing agency functions

- 2.6 Equitas Re's RRC 4, §9 run-off agency does not arise spontaneously. At Lloyd's, no SYA participant is permitted to handle his own claims. In order to conduct the run-off or any other aspect of his own insurance business at Lloyd's, he requires⁴⁰ a managing agency.⁴¹ The rule applies at Equitas Re⁴² no less than at Lloyd's.⁴³ Its absence would make insurance business at Lloyd's or at Equitas Re impossible to conduct. In RRC 4, §9, Equitas Re merely supplants⁴⁴ managing agency AUA 9 (which in turn supplanted⁴⁵ each of EquitasRe-reinsured SYA participant's origi-

³⁷ See generally RRC 4, §§10.1 - 10.2.

³⁸ RRC 4, §10.1.

³⁹ RRC 4, §10.1.

⁴⁰ See for example the relevant parts of Byelaw 8 of 1988 (and see previously for example Byelaw 1 of 1985). On the narrow requirement that a SYA participant sell insurance only through a managing agency, see Lloyd's Act 1982, s.8(2) (“An underwriting member (not being himself an underwriting agent) shall *underwrite* contracts of insurance at Lloyd's only through an underwriting agent.”). The requirement for the underwriting Member to retain an agent for a variety of purposes is of some antiquity: see for example *Hambro v Burnand* [1904] 2 KB 10, 17-18 (Collins MR); *ibid.*, 23 (Romer LJ). The accompanying SYA-level passivity rule is long established: see for example *ibid.* at 18 (Collins MR), considering a form of contemporaneous agency agreement providing that the active underwriter, Burnand “shall during the said period have the sole management of the business, and all risks shall be taken, and all losses, averages, and returns shall be settled by him in the name and on account of the [Member]; and the risks to be taken, and the claims to be settled, shall be left to the discretion of the [underwriter], and the said [Member] shall sign the necessary authority for that purpose to the bankers.” And see *Commissioners of Inland Revenue v. Laurence Philipps & Co. (Insurance), Ltd.* (1947) 80 Lloyd's List Law Reports 549, 552-553 (Atkinson J; *ibid.*, 552: “The following details are extracted from the case. Risks are undertaken by groups of underwriting members known as “syndicates.” The members are described as “names.” This is a very apt description — that is all they are”).

⁴¹ See for example Byelaw 4 of 1984. Relevant cases include (for example) *Henderson v Merrett Syndicates Ltd.* {1c} [1995] 2 AC 145 (HL) on appeal from *ibid.*, {1b} [1994] 2 Lloyd's Rep. 468 (CA) on appeal from *ibid.*, {1a} [1994] 2 Lloyd's Rep. 193 (Saville J); *Deeny v Gooda Walker Ltd.* {3} [1996] LRLR 183 (Phillips J); *Arbuthnott v Feltrim Underwriting Agencies Ltd.* [1995] CLC 437 (Phillips J); *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd's Rep. 618 (Potter J); *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265 (Cresswell J); *Berriman v Rose Thomson Young (Underwriting) Ltd.* [1996] LRLR 426 (Morison J); *Wynniatt-Husey v R.J. Bromley (Underwriting Agencies) Plc* [1996] LRLR 310 (Langley J). On the approved run-off company at Lloyd's, see for example Byelaw 2 of 1995. On a mere claims handler see recently for example *Assicurazioni Generali Spa v Arab Insurance Group* [2002] CLC 164 (Morison J).

⁴² See RRC 4, §9.4.

⁴³ See for example SUA 1 / SCA 1, §7.3:-

The Name acknowledges that he has delegated to the Agent sole management and control of the Underwriting and that the Agent is not bound to comply with any instructions or requests of the Name relating to the conduct of the Underwriting and undertakes that he will not in any way interfere with the exercise of such management or control.

And see *Henderson v Merrett Syndicates Ltd.* {1a} [1994] 2 Lloyd's Rep. 193, 197 (Saville J; not affected on appeal):-

Lloyd's could not exist as an insurance and reinsurance market unless the business is conducted by professionals who must be given the widest possible powers to act on behalf of the Names. Thus the underwriting agency agreement makes absolutely clear that the Name must leave it exclusively to the underwriting agents actually to run the business.

Its predecessor, SMA 1, §5(a), was noted at *Touche Ross & Co. v Baker* [1992] 2 Lloyd's Rep. 207, 210 (Lord Mustill). And see *Daly v Lime Street Underwriting Agencies Ltd.* [1987] FTLR 277, 280 (Staughton J; “Clearly the managing agents of a syndicate, and the active underwriter, would find it difficult to carry on business if they were liable to receive hundreds of anguished telephone calls every time that news of a major casualty appeared in the press.”).

⁴⁴ See for example June 12, 1998 letter from EquitasRe-reinsurance Trustees to EquitasRe-reinsured SYA participants, p.2:-

It was always hoped that Equitas would provide a more efficient method of running off all Lloyd's non-Life pre-1993 liabilities. replacing 90 different agencies with a single large company creates opportunities for economies of scale., Equitas also provides the resources to take a fresh look at traditional methods of running off syndicate years. Although the creation of the Company was a tremendous task, it has permitted the management to introduce radical changes that can significantly reduce the long term costs of paying the claims and collecting the relevant reinsurance.

⁴⁵ See contemporaneously for example Market Bulletin Y331, August 15, 1996 (“Transfer of syndicate cash and securities for 1992 and prior segregated years of account to Equitas”), §3 (p.5) *et seq.*

nal managing agencies). Equitas Re's RRC 4, §9 functions are merely substantially identical⁴⁶ to a managing agency's SUA 1 / SCA 1, §5 functions. RRC 4, §9.4's express passivity provisions — no EquitasRe-reinsured SYA participant principal may interfere with how Equitas Re manages or controls the run-off,⁴⁷ and Equitas Re need not heed any principal's instructions or requests should any be ventured⁴⁸ — and its reference to Equitas Re performing its §9 run-off agency functions “as if it were principal”, merely derive from relevant standard agency agreements and or byelaws. It follows that asserting in US coverage litigation against Equitas Re, or for any tribunal to hold, that Equitas Re conducts its RRC 4, §9 run-off agency functions actually as a principal is to misconstrue their managing-agency-like character. Equitas Re's RRC 4, §3's reinsurance functions do import run-off functions, but not *vice versa*.

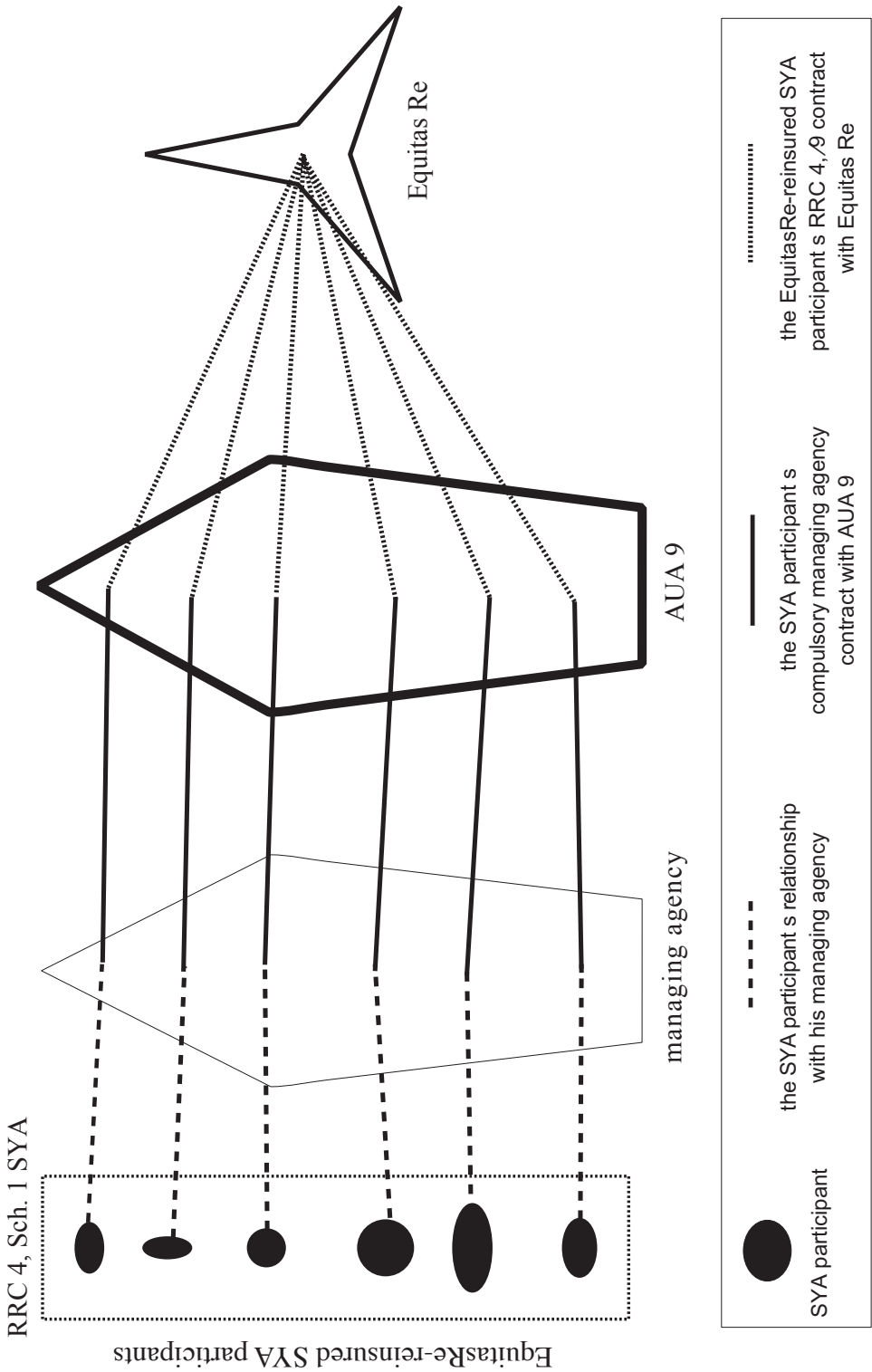
⁴⁶ Equitas Re as RRC 4, §9 run-off agent does not have any of the managing agency's cash collection functions, *viz.* (for example): (1) making cash calls for personal-use funds (the RRC 1 Accepting Name has been released from all relevant liability by each of his relevant managing agencies and by Equitas Re; RRC 4 contains none of SUA 1's cash call-making powers or personal-use provision obligations); (2) enforcing cash calls by collection (*ditto*); (3) augmenting personal-use funds by realising relevant FAL (*ditto*); (4) mobilising the Central Fund for automatic use as personal-use fund float (*ditto*).

⁴⁷ RRC 4, §9.4(b).

⁴⁸ RRC 4, §9.4(a). Interaction between Equitas Re and individual EquitasRe-reinsured SYA participants is confined largely to annual Equitas Re open meetings, on which see for example January 21, 1998 letter from Equitas Holdings' chairman to EquitasRe-reinsured SYA participants, p.3; *SOD*, p.97:-

Equitas proposes to provide Names with copies of its annual report and accounts. It also intends, in conjunction with the [EquitasRe-RTC] Trustees, to hold an open meeting of Names on an annual basis. Arrangements may also be made for open meetings of Names in overseas jurisdictions from time to time. These meetings are intended to give Names the opportunity to hear about the progress of the business and to ask questions.

RRC 4, §9 historically, by EquitasRe-reinsured stamp



some particular RRC 4, §9 powers

- 2.7 Equitas Re's RRC 4, §9 contractual run-off agency powers — all of which derive from standard managing agency agreements⁴⁹ at Lloyd's — the exercise of each of which is in its absolute discretion⁵⁰ (subject to local law⁵¹), include⁵² the following, in relation to any of which Equitas Re may use the name of any RRC 4 "Name" or "Closed Year Name":⁵³ (1) "Claims"⁵⁴ handling: settling any claim;⁵⁵ securitising any claim;⁵⁶ making any agreement which it considers will or may avoid or reduce any liability in respect of any claim;⁵⁷ entering into market agreements binding it to adopt a particular settlement policy;⁵⁸ entering into a claims handling arrangements;⁵⁹ adjusting, handling, settling, paying and compromising any "Claim" or other liability;⁶⁰ commuting any liability;⁶¹ making *ex gratia* and extra-contractual payments;⁶² exercising subrogation and similar rights;⁶³ setting off claims against inward reinsurance recoveries and *vice versa*;⁶⁴ (2) other functions:⁶⁵ agreeing and collecting premiums, claims refunds, salvages and reinsurance recoveries;⁶⁶ commencing and conducting legal proceedings;⁶⁷ retaining lawyers, claims adjusters, experts and consultants;⁶⁸ representing EquitasRe-reinsured SYA participants in market or industry discussion groups;⁶⁹ discussing anything with anyone;⁷⁰ agreeing any variation or extension of any insurance or reinsurance contract entered into by an EquitasRe-reinsured SYA participant,⁷¹ but Equitas Re has no power to unilaterally vary the terms of any insurance contract made at Lloyd's, including its implied terms, or to override relevant customary practice including (for example) timeous⁷² claims notification. There is also a general ancillary power.⁷³

⁴⁹ See the relevant provisions at SUA 1 / SCA 1; and see SMA 1 (and accompanying SSA 1) and SMA 2 (and accompanying SIA 1).

⁵⁰ RRC 4, §9.2.

⁵¹ RRC 4, §9.2 ("[Equitas Re] shall be entitled, in accordance with, and subject to, all applicable laws ...").

⁵² For the full list, see RRC 4, §9.2.

⁵³ RRC 4, §9.2(j).

⁵⁴ As defined at RRC 4, Sch. 2, §1.

⁵⁵ RRC 4, §9.2(a).

⁵⁶ RRC 4, §9.2(t).

⁵⁷ RRC 4, §9.2(i).

⁵⁸ RRC 4, §9.2(q).

⁵⁹ RRC 4, §9.2(n).

⁶⁰ RRC 4, §9.2(b).

⁶¹ RRC 4, §9.2(k).

⁶² RRC 4, §9.2(h).

⁶³ RRC 4, §9.2(l).

⁶⁴ RRC 4, §9.2(f).

⁶⁵ *SOD* distinguishes between claims handling and other aspects of run-off management: see for example *ibid.*, p.85 ("Claims management") and *ibid.*, p.86 ("Run-off Management").

⁶⁶ RRC 4, §9.2(e).

⁶⁷ RRC 4, §9.2(d).

⁶⁸ RRC 4, §9.2(p).

⁶⁹ RRC 4, §9.2(s).

⁷⁰ RRC 4, §9.2(m).

⁷¹ RRC 4, §9.2(c).

⁷² On whether the assured's compliance with the contractually stipulated deadline for notifying claims is a condition precedent to the insurer's liability, see recently for example *Alfred McAlpine Plc v BAI (Run-Off) Ltd.* [2000] Lloyd's Rep. 437 (CA); *George Hunt Cranes Ltd. v Scottish Boiler & General Insurance Co. Ltd.* [2002] Lloyd's Rep IR 178 (CA).

⁷³ RRC 4, §9.2 ("... [Equitas Re] shall be entitled ... to exercise the following powers together with all such other powers as may be necessary or expedient in relation thereto").

THE LLOYD'S BROKER

**orientation
generally**

- 2.8 Unlike reinsurance and run-off agency at Equitas Re, R&R effected no consolidation of claims broking intermediaries. The relevant EquitasRe-assured-at-Lloyd's continues to look to his own Lloyd's broker (a multi-principal⁷⁴ "servant of the market"⁷⁵) in the ordinary way to broke his claim to a reasonable standard of competence. The Lloyd's broker is required to be conversant with the assured's-at-Lloyd's relevant cover; to advise and assist him in all aspects of the claims process; to disclose to him all relevant documentary and other information;⁷⁶ and to actually broke a claim with all reasonable care and skill⁷⁷ and in accordance with relevant⁷⁸ standards. It must timeously advise the assured-at-Lloyd's on the need for timely and proper notification,⁷⁹ timeously and properly make all relevant notifications, provide the managing agency with information sufficient to enable the latter to identify the insurance, advance a proper claim⁸⁰ in good faith,⁸¹ conduct the settlement process, and generally administer the claims collection process on the assured-at-Lloyd's behalf.⁸² Underlying the Lloyd's broker's retainer and role is not its familiarity with its lay client but its intimate familiarity with the course of business at Lloyd's, specialist knowledge which must be put at the service of the actual and potential assured-at-Lloyd's. Its custody of the placing file, access to Blue Books and other records kept at Lloyd's (including at LPSO), and practised adroitness in relation to relevant procedure, practice

⁷⁴ There has been no change in the highly limited multi-agency practices (there are many others) disproved of in *Anglo African Merchants Ltd. v Bayley* [1969] 1 Lloyd's Rep. 268 (Megaw J); *North and South Trust Co. v Berkeley* [1970] 2 Lloyd's Rep. 467 (Donaldson J); and see *Pryke v Gibbs Hartley Cooper Ltd.* [1991] 1 Lloyd's Rep. 602, 615 (Waller J). *American Airlines Inc. v Hope* [1974] 2 Lloyd's Rep. 301, 304 (Lord Diplock; "Contracts of insurance are placed at Lloyd's by a broker acting exclusively as agent for the assured") is inaccurate. And see similar uninformed dicta at (for example) *Empress Assurance v C. T. Bowring Ltd.* (1906) 11 Com. Cas. 107, 112 (Kennedy J); *Glasgow Assurance Co. v Symondson* (1911) 16 Com. Cas. 109, 110 (Scrutton J); *Pryke v Gibbs Hartley Cooper Ltd.* [1991] 1 Lloyd's Rep. 602, 614-615, 618 (Waller J); *The Zephyr* [1984] 1 Lloyd's Rep. 58, 84 (Hobhouse J).

⁷⁵ *The Zephyr* [1984] 1 Lloyd's Rep. 58, 66 (Hobhouse J; not affected on appeal):-

[T]he broker performs various functions which are in the mutual interest of the assured and the underwriter. The broker has the custody of the slip, he will deal with any matters that have to be referred to leading underwriters on behalf of the other underwriters, he will calculate and prepare the appropriate documentation for the premiums, he will do the work that is required to enable any formal policies or other documents to be prepared and issued. The underwriters do have their own agencies, in the present context the ILU and the LPSO, but these agencies could not operate nor could the market without the brokers playing their part in its running. The brokers are ... "the servants of the market".

⁷⁶ *North and South Trust Company v Berkeley* [1970] 2 Lloyd's Rep. 467, 480 (Donaldson J).

⁷⁷ *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 475, 477 (Clarke J; reinsurance): the Lloyd's broker's duty:-

is to exercise all reasonable care and skill on behalf of the insured or reinsured. In my judgment, in the light of the practice in the market, that duty includes the duty to exercise all reasonable care and skill in collecting claims when asked to do so, I would if necessary hold that that obligation is implied into the contract between the insured or the reinsured and the broker by custom. The evidence of practice or usage satisfies the test that a custom must be notorious, certain and reasonable. ... It is sufficient to say that if the officious bystander with knowledge of the market were asked whether a broker owed such a duty he would say of course. In these circumstances I hold that one of the incidents of the duty of a broker which is owed to his principal is the duty to take all reasonable care and skill to collect claims when asked to do so.

And see recently *Aneco Reinsurance Underwriting Ltd. v Johnson & Higgins Ltd.* [2002] 1 Lloyd's Rep. 157 (HL).

⁷⁸ Now rescinded (because of the GISC regime), standards at Lloyd's are not irrelevant. See for example Standards for Lloyd's Claims Handling, September 25, 1991, reproduced in NMA Red Book, vol. 1, p.53 (April 1992), which provides (among other things) that: (1) the managing agency should provide a person at the box every day between 11am and 1pm and 2.30-4.30pm and provide a permanent phone number for brokers (*ibid.*, §1); (2) the claims person at the box should have full authority to make claims decisions except in difficult cases or particular types of claims (*ibid.*, §2); (3) brokers broking claims should be sufficiently experienced, and the broker's file should contain "all necessary and relevant advice and coverage documentation (minimum copy slip) to allow an informed decision to be made on the file" (*ibid.*, §3).

⁷⁹ And see the now rescinded Code: Lloyd's Brokers, §9.1: "A Lloyd's broker should explain to his clients their obligations to notify claims promptly and to disclose all material facts."

⁸⁰ *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 483 (Clarke J; reinsurance).

⁸¹ A fraudulent claim discharges the insurers from all liability under the insurance contract: see for example *Orapko v Barclays Bank Insurance Services Co. Ltd.* [1995] LRLR 443, 451 (Hoffmann LJ); *Britton v Royal Insurance Co.* (1866) 4 F. & F. 905, 909 (Willes J).

⁸² Cf. the now obsolete Code: Lloyd's Brokers, §12.

and self-regulation at Lloyd's uniquely place the Lloyd's broker — acting as the EquitasRe-assured's-at-Lloyd's agent⁸³ under its original retainer — to competently husband his claim through Equitas Re and, to the fullest extent appropriate, for as long as relevant common-use funds are available or it is otherwise appropriate to do so, through the Lloyd's enterprise. Not equipped to do such things for himself, the EquitasRe-assured-at-Lloyd's is in any event restrained by the SYA-level impenetrability rule.⁸⁴ Armed with his own personal competent, diligent claims collector, there is no reason why a claimant assured-at-Lloyd's should find himself in procedural difficulty, including in relation to relevant insurance contractual documents,⁸⁵ or relevant common-use funds, disclosure⁸⁶ of the existence of which appears to be within the Lloyd's broker's ordinary duties. The chain of brokers (local broker, wholesale broker, surplus-lines broker), and the identity, availability and competence of the insurance contract's express agent-for-notice, are side issues that do not in principle displace the Lloyd's broker's comprehensive claims broking responsibilities.

dual agency

- 2.9** The Lloyd's broker as agent of the assured-at-Lloyd's and intimate trusty of relevant components of the Lloyd's enterprise appears never to have been fully considered judicially or academically. Its notorious dual agency in relation to certain documents generated on the instructions of the claimee SYA stamp's managing agency has been judicially⁸⁷ disapproved of. Though less notorious, its dual capacity in relation to pre-insurance contract matters such as the formulation and negotiation of contract terms, and as the conduit for business for SYA participants managed by particular managing agencies (especially where the Lloyd's broker and the target SYA stamp's managing agency are formally connected⁸⁸) is no less part of the ordinary course of business at Lloyd's.

self-regulation

generally

- 2.10** Self- and external regulation of Lloyd's brokers has changed materially recently: (1) in form: Insurance Brokers (Registration) Act 1977⁸⁹ has been repealed; the Lloyd's Brokers Byelaw (Byelaw 5 of 1988)⁹⁰ amended and Code: Lloyd's Brokers⁹¹ revoked. From July 3, 2000, self-regulation of UK-based Lloyd's brokers largely passed from self-regulators-at-Lloyd's to GISC.⁹² Every Lloyd's broker was automatically eligible⁹³ to be, and from July 3, 2000 every

⁸³ See recently for example *Callaghan v Thompson* [2000] Lloyd's Rep IR 125, 132 *et seq.* (David Steel J).

⁸⁴ *Viz.*, the rule in relation to SYA participants that the assured-at-Lloyd's cannot deal with (including, for example, by notifying a claim directly to) any SYA participant personally: it is the obverse of the SYA-level passivity rule whereby the SYA participant is conducting his own insurance business other than through a managing agency. The SYA-level passivity rule in relation to the SYA participant selling insurance arises from (but is not confined to) Lloyd's Act 1982, s.8(2) ("An underwriting member (not being himself an underwriting agent) shall underwrite contracts of insurance at Lloyd's only through an underwriting agent."; the prohibition is extended to all other aspects of the SYA participant's insurance business by the present form of SUA 1 / SCA 1), and in relation to buying insurance, *ibid.*, s.8(3) ("An underwriting member shall in the course of his underwriting business at Lloyd's accept or place business only from or through a Lloyd's broker or such other person as the Council may from time to time by byelaw permit.").

⁸⁵ See p.64.

⁸⁶ See p.104.

⁸⁷ *Anglo African Merchants Ltd. v Bayley* [1969] 1 Lloyd's Rep. 268 (Megaw J); *North and South Trust Co. v Berkeley* [1970] 2 Lloyd's Rep. 467 (Donaldson J) deal with a very limited area of Lloyd's broker dual agency. That dual agency is far more extensive.

⁸⁸ As there increasingly is despite Lloyd's Act 1982, ss.10 ("Restrictions affecting Lloyd's brokers") and 11 ("Restrictions affecting managing agents").

⁸⁹ Repealed by Financial Services and Markets Act 2000, Sch. 22.

⁹⁰ Presently relevant provisions revoked by Intermediary Amendment Byelaw (No. 10 of 2000), §1(m).

⁹¹ Revoked by Intermediary Amendment Byelaw (No. 10 of 2000), §1(m).

⁹² Mkt. Bn. Y2309, May 22, 2000 ("Lloyd's distribution policy"), p.2:-

Lloyd's broker generally was required to be,⁹⁴ a member of GISC.⁹⁵ GISC will apparently transfer its broker-regulating functions to FSA, and be wound up, in or by 2004;⁹⁶ (2) in substance. The Lloyd's broker is now required to comply with GISC Private Customer Code and GISC Commercial Customer Code, neither of which is specific to claims broking at either Lloyd's or Equitas Re or contains all relevant express provisions in either Lloyd's Brokers Byelaw (No. 5 of 1988) or Code: Lloyd's Brokers.

GISC Private Customer Code

- 2.11** In relation to the "Private Customer"⁹⁷ assured-at-Lloyd's, the Lloyd's broker is required to comply with the GISC's Private Customer Code. The broker must handle claims "fairly and promptly".⁹⁸ The Lloyd's broker must "respond promptly, explain how we will handle your claim and tell you what you need to do";⁹⁹ give "reasonable guidance to help you make a claim under your policy"; "consider and handle your claim fairly and promptly, and tell you how your claim is progressing"; "tell you, in writing, and explain why, if we cannot deal with all or any part of your claim; and once we have agreed to settle your claim, we will do so promptly".¹⁰⁰ As to documentation, the Lloyd's broker "will make sure you receive all the documentation you need".¹⁰¹ and "give you information in writing, especially if there is a lot of information or if it is very complicated";¹⁰² "will make sure that all the written information and documents we send you are clear, fair and not misleading";¹⁰³ "will send you all the documentation you need promptly";¹⁰⁴ "will not withhold any insurance documentation from you without your permission, unless we are allowed to do so by law. If we do withhold any documents, we will make sure that you receive full details of your insurance cover and any documents that you need to have by law."¹⁰⁵ The Code requires the Lloyd's broker to "handle complaints fairly and promptly";¹⁰⁶ will acknowledge [a complaint] promptly, explain how we will handle your complaint and tell you what you need to do; and we will consider and handle your complaint fairly and promptly, and tell you how your complaint is progressing."¹⁰⁷ The Code declares that the Lloyd's broker is "a member of a recognised independent dispute resolution scheme. If you are not happy with our final response to your complaint, we will tell you how you can contact this scheme."¹⁰⁸ and is "monitored independently by GISC to make sure that we meet the standards

As from 3 July 2000, the Council will discharge its responsibilities for the regulation of Lloyd's brokers based in the UK through the General Insurance Standards Council

- ⁹³ See for example Mkt. Bn. Y2309, May 22, 2000 ("Lloyd's distribution policy"), attachment, p.1 ("Changes as at 3 July 2000"; "All current Lloyd's brokers qualify for membership of the GISC.").
- ⁹⁴ Reg. Bn. 50/2000, May 31, 2000 ("Lloyd's distribution policy"), p.1-2; Mkt. Bn. Y2309, May 22, 2000 ("Lloyd's distribution policy"), attachment, p.1 ("Changes as at 3 July 2000").
- ⁹⁵ A Lloyd's broker not a GISC member by July 3, 2000 was not to be permitted to place new or renewal business at Lloyd's until it joins GISC: Reg. Bn. 50/2000, May 31, 2000 ("Lloyd's distribution policy"), p.2. A Lloyd's broker not a GISC member by September 1, 2000 was to be de-registered by self-regulators at Lloyd's: *ibid*. GISC circulated membership forms to Lloyd's brokers in June 2000 (*ibid*.)
- ⁹⁶ See www.gisc.co.uk for latest.
- ⁹⁷ Per GISC Rules 2000, §B, "Private Customer" means "a Customer who is a natural person acting otherwise than solely for the purposes of his or her business."
- ⁹⁸ GISC Private Customer Code, §6.
- ⁹⁹ GISC Private Customer Code, §6.2.
- ¹⁰⁰ GISC Private Customer Code, §6.2.
- ¹⁰¹ GISC Private Customer Code, §7.
- ¹⁰² GISC Private Customer Code, §7.1.
- ¹⁰³ GISC Private Customer Code, §7.2.
- ¹⁰⁴ GISC Private Customer Code, §7.3.
- ¹⁰⁵ GISC Private Customer Code, §7.4.
- ¹⁰⁶ GISC Private Customer Code, §9.
- ¹⁰⁷ GISC Private Customer Code, §9.2.
- ¹⁰⁸ GISC Private Customer Code, §9.3.

of this Private Customer Code. If we do not satisfy the requirements of the Private Customer Code, we may face a penalty".¹⁰⁹ "The Private Customer Code forms part of the Membership Contract (which is governed by English law) between GISC and us. Nothing in the Private Customer Code or in our Membership Contract with GISC will give any person any right to enforce any term of our Membership Contract which they would otherwise have under the Contracts (Rights of Third Parties) Act 1999".¹¹⁰

GISC Commercial Customer Code

- 2.12** In relation to the "Commercial Customer"¹¹¹ assured-at-Lloyd's, the Lloyd's broker is required to comply with the GISC's Commercial Customer Code. The Code's "Core Principles" require the Lloyd's broker to act with due skill, care and diligence;¹¹² observe high standards of integrity and deal openly and fairly with their Commercial Customers;¹¹³ seek from its Commercial Customer such information about its circumstances and objectives as might reasonably be expected to be relevant in enabling the Lloyd's broker to fulfil its responsibilities to that customer;¹¹⁴ take reasonable steps to give its Commercial Customer sufficient information in a comprehensible and timely way to enable it to make balanced and informed decisions about its insurance;¹¹⁵ take appropriate steps to safeguard information, money and property held or handled on behalf of the Commercial Customer;¹¹⁶ conduct the Lloyd's broker's business and organise their affairs in a prudent manner;¹¹⁷ seek to avoid conflicts of interest, but where a conflict is unavoidable or does arise, manage it in such a way as to avoid prejudice to any party. The Lloyd's broker will not unfairly put its own interests above its duty to any of its Commercial Customers;¹¹⁸ and will handle complaints fairly and promptly.¹¹⁹
- 2.13** The Lloyd's broker will give the Commercial Customer "on request" reasonable guidance in pursuing a claim under the policy;¹²⁰ handle claims fairly and promptly and keep the Commercial Customer informed of progress;¹²¹ inform the Commercial Customer in writing, with an explanation, if unable to deal with any part of a claim;¹²² forward settlement of a claim, without avoidable delay, once it has been agreed;¹²³ will reply promptly or use their best endeavours to obtain a prompt reply to all correspondence;¹²⁴ will forward documentation without avoidable delay;¹²⁵ should not withhold from their Commercial Customers any written evidence or documentation relating to their contracts of insurance without their consent or adequate and justifiable reasons being disclosed in writing and without delay. If a broker withhold a document from its Commercial Customer by way of a lien for monies due, it "should provide advice of this ... in writing at the time that the documents are withheld. If any documentation is withheld [the bro-

¹⁰⁹ GISC Private Customer Code, §10.1.

¹¹⁰ GISC Private Customer Code, §10.2.

¹¹¹ Per GISC Rules 2000, §B, "Commercial Customer" means "a Customer who is not a Private Customer".

¹¹² GISC Commercial Customer Code, §1.1.

¹¹³ GISC Commercial Customer Code, §1.2.

¹¹⁴ GISC Commercial Customer Code, §1.3.

¹¹⁵ GISC Commercial Customer Code, §1.4.

¹¹⁶ GISC Commercial Customer Code, §1.5.

¹¹⁷ GISC Commercial Customer Code, §1.6.

¹¹⁸ GISC Commercial Customer Code, §1.7.

¹¹⁹ GISC Commercial Customer Code, §1.8.

¹²⁰ GISC Commercial Customer Code, §35.

¹²¹ GISC Commercial Customer Code, §36.

¹²² GISC Commercial Customer Code, §37.

¹²³ GISC Commercial Customer Code, §38.

¹²⁴ GISC Commercial Customer Code, §39.

¹²⁵ GISC Commercial Customer Code, §40.

ker] will ensure that Commercial Customers receive full details of the insurance cover and any documents to which they are legally entitled;¹²⁶ will seek to avoid conflicts of interest, but where this is unavoidable, ... will explain the position fully and manage the situation in such a way as to avoid prejudice to any party";¹²⁷ will not put its own interests above its duty to any Commercial Customer client;¹²⁸ will provide details of its complaints procedures to Commercial Customers, and details, if appropriate, of any dispute resolution facility which is available to them,¹²⁹ and will handle complaints fairly and promptly.¹³⁰

generating documents

- 2.14** Under the now obsolete Byelaw 5 of 1988 regime at Lloyd's, which presently has no exact analogue in the GISC rulebook, every Lloyd's broker, whether it brokered or assisted in broking,¹³¹ and whether it handled the claim or assisted in handling it,¹³² was required to make proper records of every relevant insurance contract,¹³³ particularly of the identity of all participating insurers and the amounts of their respective participations; full particulars of the insurance contract's terms and conditions; a copy of the policy or other document containing the wording of the "contract" in the form in which it was issued; the broker's slip; and a copy of any agreement or endorsement made after the contract was made affecting its terms.¹³⁴ The assured-at-Lloyd's is not expected to retain this information¹³⁵ and is not contributorily negligent for failing to do so.¹³⁶ Where the Lloyd's broker gave the reinsured only a cover note¹³⁷ without the reinsurers' names, the Lloyd's broker was expressly required to exercise reasonable care and skill to enable it to ascertain those names, a duty which includes retaining the slip.¹³⁸

¹²⁶ GISC Commercial Customer Code, §41.

¹²⁷ GISC Commercial Customer Code, §42.

¹²⁸ GISC Commercial Customer Code, §43.

¹²⁹ GISC Commercial Customer Code, §46.

¹³⁰ GISC Commercial Customer Code, §47.

¹³¹ *Per* now revoked Byelaw 5 of 1988, §47(3), where a Lloyd's broker assists in arranging or processing details of a contract of insurance arranged by another person (other than a non-Lloyd's broker placing business pursuant to an umbrella arrangement registered under Byelaw 6 of 1988, it must make records of relevant matters and obtain from that other person such information and documents as are necessary to enable it to do so.

¹³² See now revoked Byelaw 5 of 1988, §47(4):-

Where a Lloyd's broker assists in notifying, processing or resolving a claim made by an assured or reassured under a contract of insurance (whether or not the Lloyd's broker arranged or assisted in arranging the contract) it shall make records of all material particulars relating to the notification, processing and resolution of the claim to the extent that it is involved in notifying, processing or resolving it; but nothing in this sub-paragraph obliges a Lloyd's broker to make records in respect of any claim notified, processed or resolved by or through a non-Lloyd's broker with whom the Lloyd's broker has an umbrella arrangement registered under the Umbrella Arrangements Byelaw (No. 6 of 1988).

¹³³ See now revoked Byelaw 5 of 1988, §47(1).

¹³⁴ See now revoked Byelaw 5 of 1988, §47(2)(a)-(e).

¹³⁵ *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 477-8 (Clarke J; reinsurance): "Although the principal would have been told the name of each of the underwriters comprising the security he would not have been expected to make a note of it, firstly because he would have expected to receive a cover note, and secondly because he would have expected the broker to collect claims on his behalf and to that end to retain sufficient information to enable him to do so." Ordinarily it would be absurd for the assured-at-Lloyd's to even be interested in the identity of an individual contracting SYA participant.

¹³⁶ *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 483-4 (Clarke J; reinsurance).

¹³⁷ In *Baker v Black Sea & Baltic General Reinsurance Co. Ltd. and Equitas Reinsurance Ltd.* [1998] 1 WLR 974 (Potter J), "much of the documentation had long since been lost or destroyed" (*ibid.*, 976) and the only document to have survived a continuous reinsurance contract incepting in 1957 and litigated in the 1990s was the April 1957 cover note" (*ibid.*, 977).

¹³⁸ *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 477-8 (Clarke J; reinsurance).

retaining documents generally

- 2.15 The mere supervision of GISC regulation does not of itself supplant, invalidate or terminate relevant practice, or entitle the Lloyd's broker to divest itself of relevant records contrary to that practice. The Lloyd's broker must, in accordance with current best practice,¹³⁹ retain and marshal documents necessary to enable it to properly and completely broke the claim in the first place;¹⁴⁰ sometimes the Lloyd's broker is the exclusive source of all relevant documentation.¹⁴¹ The Lloyd's broker as the assured's-at-Lloyd's agent must retain the policy and the slip¹⁴² (or other evidence of cover) if no policy has been generated.¹⁴³ The Lloyd's broker usually does keep originals or copies of slips and policies: it appears to be not customary for leaders or followers to do so.¹⁴⁴ Where the Lloyd's broker was through its own negligent record-keeping unable to ascertain reinsurers against whom an assured's claim should be made, the assured's damages may be assessed on that percentage of all the insurers who could properly be supposed to have actually paid the claim.¹⁴⁵

for how long?

- 2.16 The Lloyd's broker must retain documents for as long as a reasonably skilful and careful broker would regard a claim as possible.¹⁴⁶ The Rulebook at Lloyd's, in now obsolete provisions, required the Lloyd's broker to retain documents — in any manner either in legible form or capable of being reproduced in legible form¹⁴⁷ — for not less than eighty years after the insurance contract's formation.¹⁴⁸ In the case of an insurance contract effected by an assured-at-Lloyd's other than for the purposes of a business carried on by him, and where he instructs the Lloyd's broker from a UK address, the period was reduced to fifteen years from the later of the insurance's expiry, the final settlement of the latest claim made under the contract, and the final adjustment (where applicable) of any premiums paid in respect of the contract.¹⁴⁹ Documentation relating to

¹³⁹ *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 483 (Clarke J; reinsurance). Where the practice is for the Lloyd's broker to keep all records, the assured need not retain the name of the insurer: *ibid.*, 475.

¹⁴⁰ *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 477-8, 482-3 (Clarke J; reinsurance).

¹⁴¹ See for example *Gillis v Eagleson et al.* 71 C.P.R. 3d 292, 299; Ontario Court (General Division); "The only written record maintained by Lloyd's was a claims file kept by the broker Crawley Warren"). Traditionally, the active underwriter apparently does not receive a copy of either the signed slip or the policy: he contacts the Lloyd's broker directly where he wants to query any matter: LPSOM, p.210, §4.1 ("By contacting the broker directly, the underwriter saves time. The broker can investigate the query at first hand and, if a correction is necessary, advise LPSO"). And see Equitas Claims Unit: Claims Handling Guidelines (undated), §1.1: "Under traditional and current practice, the assured's London broker is the repository for the essential documentation relating to the placement of Insurance underwritten at Lloyd's, and related claims records."

¹⁴² *The Zephyr* [1984] 1 Lloyd's Rep. 58, 66 (Hobhouse J; not affected on appeal).

¹⁴³ *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 478 (Clarke J; reinsurance):-

[W]here the broker retains the slip (which is his property) and no policy (whether slip policy or otherwise) comes into existence, it seems to me that, as part of his duty to exercise reasonable care and skill on behalf of his principal, the broker must nevertheless owe a duty not to destroy the slip without seeking the instructions of his principal. ... It would in my judgment be a breach of duty for a broker in a case like this to destroy a slip without the consent of his principal, especially in circumstances where the only document which the broker had given to him was a cover note which did not identify the security.

¹⁴⁴ See the discussion at *American Airlines Inc. v Hope* [1974] 2 Lloyd's Rep. 301, 305 (Lord Diplock).

¹⁴⁵ As at *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 484 (Clarke J; reinsurance).

¹⁴⁶ *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 478 (Clarke J; reinsurance):-

[T]he duty of the broker cannot be to retain information for ever. It is not an absolute duty but only a duty to exercise all reasonable care and skill. ... Once a time comes when a reasonable broker would no longer regard a claim as possible, the exercise of reasonable care and skill cannot in my judgment require relevant information to be retained. On the other hand, so long as a claim can reasonably be regarded as possible, it remains the duty of the broker to retain sufficient information to enable a claim to be made.

And see *ibid.*, 482-3.

¹⁴⁷ Now obsolete Byelaw 5 of 1988, §47(8).

¹⁴⁸ Now obsolete Byelaw 5 of 1988, §47(7)(b)(ii).

¹⁴⁹ Now obsolete Byelaw 5 of 1988, §47(7)(a)(i)-(iii).

claims had to be retained for fifteen years after the final settlement of the latest claim made under the contract.¹⁵⁰ GISC Rules 2000 appear to contain no equivalent provision.¹⁵¹

PRESENTING THE CLAIM

personages

agent for notice of a relevant event

- 2.17 Equitas Re has indicated that a claim — “an assured’s assertion against an identified policy that it is entitled to a defence, or indemnification, or both”¹⁵² — should be notified by an EquitasRe-assured-at-Lloyd’s pursuant to the terms of the policy,¹⁵³ and that if the policy does not¹⁵⁴ state to whom notice should be given, it should be given to the “assured’s broker”, as his agent,¹⁵⁵ “who should forward it promptly to the assured’s London broker, who should forward it promptly to the Equitas Claims Unit or its subcontractor”.¹⁵⁶

broker

- 2.18 Some EquitasRe-assureds-at-Lloyd’s present directly to Equitas Re. Equitas Re’s apparent preference is to receive a claim through a beneficent London broker.¹⁵⁷

brokee of a relevant claim; importance of relevant common-use funds

- 2.19 Ordinarily at Lloyd’s, the assured’s-at-Lloyd’s Lloyd’s broker brokes the claim to the managing agency (or its delegates) of the participants on the relevant SYA, not to a SYA participant’s reinsurer. RRC 4, Sch. 4, §1.6 appears to recognise the logic of the Lloyd’s broker broking the EquitasRe-assured’s-at-Lloyd’s claim to AUA 9, but neither the latter nor any other person at Lloyd’s is designated by Equitas Re or otherwise, or considered by Lloyd’s brokers apt, to receive or handle any claim on any EquitasRe-reinsured liability. Rather, the Lloyd’s broker appears to have received instructions¹⁵⁸ from self-regulators-at-Lloyd’s to broke a claim on an EquitasRe-reinsured liability to Equitas Re.¹⁵⁹ Equitas Re presumably receives the claim as both RRC 4, §3 reinsurer (*per* its inherent claims handling powers) and as *ibid.*, §9 run-off agent (*per* its express RRC 4, §9.2(a) powers. The Council has not established a formal procedure for any claim to be made on any relevant common-use claims payment securitisation fund (whether available by right¹⁶⁰ or by argument¹⁶¹) at the Lloyd’s enterprise.

¹⁵⁰ Now obsolete Byelaw 5 of 1988, §47(7)(b)(i). See fn. 90.

¹⁵¹ But see peripherally GISC Rules 2000, G1, §14.2, 15; *ibid.*, G2, §13. GISC is presently understood to be about to promulgate guidance on document retention.

¹⁵² Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.1.

¹⁵³ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.2.

¹⁵⁴ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.2.

¹⁵⁵ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.2: “The assured’s producing broker and London Market broker are typically the assured’s agents for purposes of advising claims to the London Market Insurers.”

¹⁵⁶ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.2.

¹⁵⁷ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.3:-

From time to time, we may ... receive a claim direct from an assured, its producing broker, or Lloyd’s Advisory Department. In such cases, we should ask the assured to present the claim through the London broker to permit the London broker to provide proper assistance and documents and to identify the subscribing London Market insurers and their several shares of the risk assured. It is only possible for us to exercise authority for our syndicates where we know of their involvement.

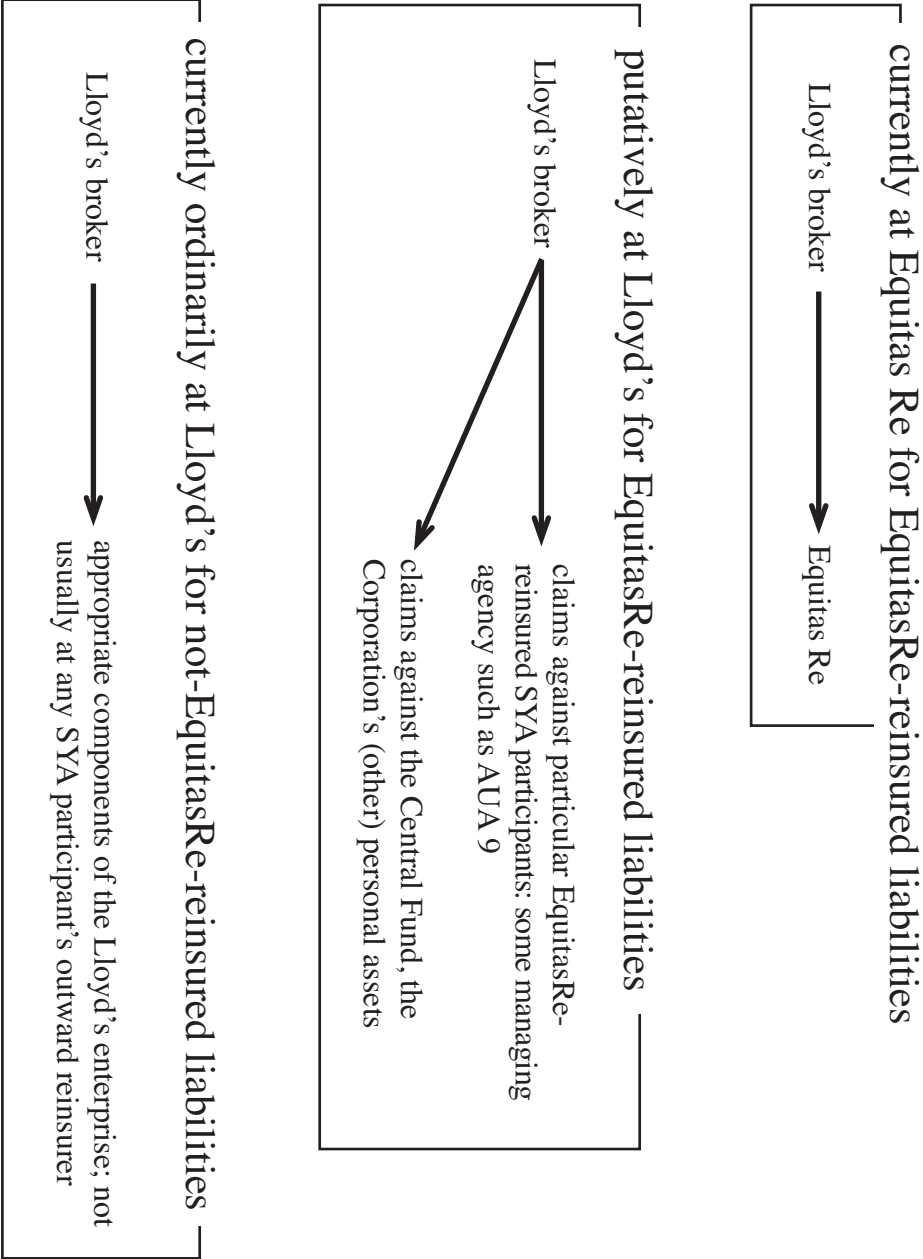
¹⁵⁸ See for example contemporaneously Market Bulletin Y099, January 10 1996 (“Equitas claims handling arrangements”).

¹⁵⁹ But see the highly opaque Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.3 (presumably in relation to the London company component of a particular claim): “Traditional and customary London Market practice requires an assured’s London broker, or other agent for notice, to present a claim to the lead and other London Insurers. Generally, this is the only way by which we can obtain sufficient information needed to begin handling a claim”.

¹⁶⁰ For example Lloyd’s US Surplus-Lines Common-Use Trust Fund and Lloyd’s US Credit-for-Reinsurance Common-Use Trust Fund: see Chapter 3, Sub-chapter 1.

¹⁶¹ For example the Central Fund and the Corporation’s (other) personal assets: see Chapter 3, Sub-chapter 2.

claims broking at Equitas Re and at Lloyd’s



**claims documentation generally
apparently for all claims**

- 2.20** Equitas Claims Unit: Claims Handling Guidelines (undated) indicate that the Lloyd’s broker should maintain and make available to it on request “legible and easily retrievable” insurance contract and claims information, including the name of the principal assured, any assigned claim number, complete copies of all relevant insurance contracts or other “clear and reliable evidence of the complete provisions of the contracts”, copies of the slips listing all subscribing insurers, date and location of loss, claims advices and communications from and to an assured respecting a claim, including but not limited to requests for information and reservations of rights plus the date of every written or oral communication; date of payment of the claim, date of any denial of coverage, the complete placing submission, and the date on which the claim file was closed.¹⁶² Equitas Re has indicated that the claimant should particularly provide the name and address of the policy’s principal assured, the policy which the claimant believes should respond to the claim, the facts giving rise to the claim, the amount claimed; date, location and description of the loss, the claimant’s name and address, the name and address of any other person or entity allegedly involved in the facts giving rise to the claim, and “other information in order to enable us to respond to the claim”.¹⁶³

lost policies

- 2.21** Equitas Re has issued guidelines governing claims under lost policies. If notified in writing that the claimant “believes that there are one or more Lloyd’s policies that are lost”,¹⁶⁴ it “will”, if the London broker can be identified, suggest within fifteen business days to the EquitasRe-assured-at-Lloyd’s that he ask that broker to provide all available information about such policies.¹⁶⁵ If that broker cannot be “identified”, Equitas Re “will” start its own investigation within fifteen business days, which may include asking Lloyd’s Complaints and Advisory Department to look for evidence of those policies, examining evidence provided by the EquitasRe-assured-at-Lloyd’s so as to identify “potentially involved” London brokers and or “syndicates”, and making reasonable efforts to find information relating to those policies in the available records of “syndicates” “that” may have subscribed to such policies.¹⁶⁶

**documentation requirements for asbestos bodily injury claims
generally**

- 2.22** Equitas Re has promulgated “documentation requirements” for asbestos bodily injury claims (colloquially “DRs”¹⁶⁷ — in this Edition, “Asbestos Documentation Requirements 1”; presently the subject of litigation in the US¹⁶⁸). Part of Equitas Re’s “comprehensive strategy”¹⁶⁹ on as-

¹⁶² Equitas Claims Unit: Claims Handling Guidelines (undated), §1.1(a)-(i).

¹⁶³ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.5(a)-(i).

¹⁶⁴ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.7.

¹⁶⁵ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.7(a).

¹⁶⁶ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.7(b)(i)-(iii). Note the consistently erroneous use of “syndicate”. A syndicate does not subscribe to anything.

¹⁶⁷ For the practice elsewhere in the London market, see for example KWELM administrators’ 7th Annual Report to Creditors, p.13 (“Notice of claim should ... include: fully particularised details of how and when the claim arose; details of the contract of insurance or reinsurance under which the claim arose; the quantum of the claim if reasonably calculable; copies of all relevant contracts, orders, judgements, decisions and awards; any other supporting information which may assist.”)

¹⁶⁸ See generally for example *Associated International Insurance Co. v Mendes & Mount, et al.*, No. 270320, Calif. Super., Los Angeles Co. (filed Mar. 29, 2002) (Associated International Insurance Co. (AIIC) alleges Equitas Ltd. and Certain Underwriters at Lloyd’s London are trying to delay and avoid reimbursing cedants for asbestos bodily injury claims by imposing new reinsurance documentation requirements); *Dresser Industries, Inc. v Underwriters at Lloyd’s London, et al.*, No. 01-07414 (Dallas Cty. Tx) (filed Aug. 28, 2001) (breach of contract; breach of duty of good faith and fair dealing); *Dresser Industries, Inc. v Underwriters at Lloyd’s London, et al.*, No. 01-6540-K (Dallas Cty. Tx.) (breach of contract; breach of duty of good faith and fair dealing); *Asarco Inc. et al. v American Home Ins. Co., et al.*, No. 01-2680-D (Nueces Cty. Tx) (breach/anticipatory breach of contract; breach of duty of good faith and fair dealing); *In re Harbison-Walker*

bestos claims — “simple in concept”¹⁷⁰ and a “straightforward effort to obtain reasonable baseline information”¹⁷¹ — they apply to each asbestos bodily injury claim submitted by the EquitasRe-assured-at-Lloyd’s on or after June 1, 2001, but not to a claim resolved on or after June 1, 2001 under the terms of a settlement agreed before April 27, 2001 advised to the insurer and not objected to.¹⁷² The requirements are not intended to exceed US evidence requirements for an alleged injuree (“claimant”) to establish a *prima facie* case that he or she suffers from an asbestos-induced bodily injury for which the EquitasRe-assured-at-Lloyd’s is responsible; if a different standard of proof applies in a particular relevant jurisdiction, the requirements may be modified accordingly.¹⁷³ Insurers expressly reserve the right to amend the requirements so as to require additional or different documentation, or to make them applicable to other categories of claims, in light of experience in administering the requirements, additional relevant information, changes in applicable law, changes in the behavior of alleged injurees (“claimants”) or their counsel, or other circumstances.¹⁷⁴

Refractories Co., No. 02-21627, *Harbison-Walker Refractories Co. v. Dresser Industries, Inc., et al.*, Adv. No. 02-2151 (W.D. Pa. Bankr.) (breach/anticipatory breach of contract; breach of good faith and fair dealing). And see for example *Mealey’s Litigation Report: Reinsurance*, April 4, 2002, p.3 (“London Reinsurers Accused Of Imposing Documentation Requirements In Bad Faith”).

169 See recently for example Equitas Holdings RA fye March 31, 2002, p.11 (Claims Director’s review):-

Equitas has implemented a comprehensive strategy for managing asbestos claims, especially claims filed by unimpaired persons. There are early indications that our asbestos initiatives could substantially reduce payments for meritless claims and ensure that valid claims are resolved at reasonable values. At this point, however, we cannot say with certainty whether these initiatives will ultimately be successful.

See generally *ibid.*, p.11-13. And see *ibid.*, p.5 (Chief Executive Officer’s review): “We have continued to implement and expand on the various strategies to manage asbestos claims discussed in last year’s Report & Accounts. Although it will be many years before we can fully evaluate the effectiveness of these initiatives, early indications are promising.” See also the extensive review of asbestos liabilities at Equitas Holdings RA fye March 31, 2001. And see Scott Moser, Equitas Claims, Address to the Insurance Institute of London, January 14, 1999 (“Equitas is firmly committed to negotiation, rather than litigation, when settling claims”). See similarly Mealey’s Seminar Friday 16th November 2001 — Presentation By Scott Moser Equitas Claims Director at *Mealey’s Litigation Report: Insurance*, December 11, 2001, p.27, 29-34.

170 Equitas Group June 21, 2002 press release (EQ36; “Equitas announces financial results for year ended 31 March 2002”), Commentary on Equitas’ financial results for the year ended 31 March 2002:-

The documentation requirements (DRs) are simple in concept. Before London Market insurers, including Equitas, will reimburse an asbestos bodily injury claim presented by a policyholder, the policyholder must document the existence of a genuine asbestos related injury that was caused by the policyholder’s products or premises. ... Equitas believes the DRs and RDRs will have a significant impact on the reimbursement of claims filed by unimpaired persons. The limited experience to date with the DRs has been encouraging. There is evidence that the requirements are beginning to change at least some policyholders’ willingness to settle unimpaired claims and the willingness of some claimants’ lawyers to pursue such cases. Five major policyholders have certified that the claims they have submitted for reimbursement comply with the DRs, and Equitas has paid such claims promptly, subject to a right to audit them to verify the accuracy of the certifications. Equitas is encouraging other policyholders to follow these examples. On the other hand, some policyholders have failed to certify that their claims comply with the DRs, and Equitas has consequently declined to pay these claims without proof that the claims are properly reimbursable. In addition, some policyholders and cedants are challenging Equitas’ refusal to reimburse claims that do not comply with the DRs or RDRs.

171 Mealey’s Seminar Friday 16th November 2001 — Presentation By Scott Moser Equitas Claims Director at *Mealey’s Litigation Report: Insurance*, December 11, 2001, p.27, 32:-

Our Documentation Requirements are not aimed at stopping payment to those with real asbestos diseases which are caused by a policyholder’s products. The DR’s are a straightforward effort to obtain reasonable baseline information to confirm that such a claim exists.

And see *ibid.*:-

We consulted with policyholders about the DR’s, took their comments into account, and made many modifications. One striking aspect of this process was the widespread agreement we found on the basic underlying principles. ... Most policyholders ... acknowledged that the Documentation Requirements reflect sound standards for deciding which claims should be paid and which should not. All the problems with the DR’s were “practical” ones created by the dysfunctional “asbestos system”....

On that consultation, see for example standard February 2001 letter from Mendes & Mount, LLP, p. 1: “The Documentation Requirements are attached hereto. You are invited to review and comment upon them before they become effective”.

172 Asbestos Documentation Requirements 1, §E.

173 Asbestos Documentation Requirements 1, §G.

174 Asbestos Documentation Requirements 1, §D.

some particular Equitas Re approaches

- 2.23 Equitas Re's claims director has indicated that "we should" challenge last-minute trial plaintiffs; use Federal Rules of Civil Procedure, Rule 11 to seek dismissal of cases brought solely following mass screenings; ask courts to appoint impartial experts; challenge juxtaposition of sick and not-sick plaintiffs in the same suit; challenge "abusive" attempts to seek punitive damages against defendants who acted without knowledge of the dangers of asbestos' challenge "inadequate product identification, junk science and medical evidence unworthy of being called a diagnosis"; and challenge damages awards to plaintiffs who are not "really sick".¹⁷⁵

latitude

- 2.24 Equitas Re, apparently not uncompromising, indicates that it will evaluate a claim not meeting Asbestos Documentation Requirements 1 on the EquitasRe-assured's-at-Lloyd's reasonable written request, who will be given the opportunity to demonstrate sufficient evidence of injury and causation notwithstanding the non-compliance.¹⁷⁶ For each not-compliant claim, the EquitasRe-assured-at-Lloyd's must specify the non-compliance, and "state the basis for its position" that the claim is covered.¹⁷⁷ In evaluating not-compliant claims, insurers may use a panel of medical experts.¹⁷⁸

the DRs' principal provisions

- 2.25 Asbestos Documentation Requirements 1 (substantially similar to Inward Reinsurance Documentation Requirements 1¹⁷⁹) have five principal parts:-

(1) general requirements (Part A): whether claiming reimbursement or to exhaust underlying limits, the EquitasRe-assured-at-Lloyd's must make available for inspection the alleged injuree's name and social security number; copies of the complaint (if the case is in litigation), or other document making the claim (if not in litigation); the payment cheque provided to the injuree; evidence of the gross amount payable with respect to the claim before deduction of attorney's fees or expenses; and evidence of amounts the injuree has received from other allegedly responsible parties (if such evidence may ordinarily be obtained during discovery in the relevant forum);¹⁸⁰

(2) medical documentation (Part B): a "specific" medical diagnosis is required that the alleged injuree "suffers from a disease caused in substantial part by exposure to asbestos", not merely from a disease "consistent with" or "compatible with" a relevant condition.¹⁸¹ For all claims, the EquitasRe-assured-at-Lloyd's must obtain from the alleged injuree or his representative authorisation to gain access to full supporting medical data on the insurer's reasonable request.¹⁸² Specific supporting documents are required for each of mesothelioma,¹⁸³ lung cancer and other can-

¹⁷⁵ Mealey's Seminar Friday 16th November 2001 — Presentation By Scott Moser, Equitas Claims Director at *Mealey's Litigation Report: Insurance*, Vol. 16, #6, December 11, 2001, pp.27 (also pub. sub. nom. *Asbestos Claims By People Who Are Not Sick Or Who Were Hurt By The Companies They Sue*, at *Mealey's Litigation Report: Reinsurance*, Vol. 12, #16, December 20, 2001, p.20), 33.

¹⁷⁶ Asbestos Documentation Requirements 1, §D. An EquitasRe-assured-at-Lloyd's is particularly permitted to submit an asbestosis claim supported by an ILO reading of 1/0 with corroborating evidence of asbestosis: *ibid*.

¹⁷⁷ Asbestos Documentation Requirements 1, §D.

¹⁷⁸ Asbestos Documentation Requirements 1, §D.

¹⁷⁹ See p.68.

¹⁸⁰ Asbestos Documentation Requirements 1, §A.

¹⁸¹ Asbestos Documentation Requirements 1, §B, first sentence.

¹⁸² Asbestos Documentation Requirements 1, §B.6.

¹⁸³ *Viz.*, diagnosis by a qualified physician based on appropriate pathological examination: Asbestos Documentation Requirements 1, §B.1.

cers,¹⁸⁴ asbestosis,¹⁸⁵ pleural disease,¹⁸⁶ and pleural plaques.¹⁸⁷ Claims supported by diagnoses, test readings or other medical reports of seven particular named physicians must be identified as such when submitted to insurers for reimbursement,¹⁸⁸

(3) product identification and exposure documentation (Part C): “sufficient” evidence is required that the claimant was exposed to an asbestos-containing product of the EquitasRe-assured-at-Lloyd’s (or, for premises/operations claims, was exposed to asbestos in connection with the EquitasRe-assured’s-at-Lloyd’s premises or operations).¹⁸⁹ Specific supporting documentation is required for each of products claims¹⁹⁰ and premises/operations claims¹⁹¹ together with the alleged injuree’s comprehensive work history including all employers; for each employer, the location and dates of employment, occupation and job duties;¹⁹² and a sworn or verified statement by the claimant (or other witness with personal knowledge) “specifically” evidencing the specific circumstances of the alleged injuree’s alleged exposure to asbestos contained in the EquitasRe-assured’s-at-Lloyd’s product (or, for premises/operations claims, how the alleged injuree was exposed in connection with the EquitasRe-assured’s-at-Lloyd’s premises or operations) and during what period of time.¹⁹³ Evidence that the alleged injuree worked in any of eight particular trades is sufficient to evidence exposure for documentation requirements purposes;¹⁹⁴

(4) certification and reservation (Part D); for each asbestos bodily injury claim submitted by the EquitasRe-assured-at-Lloyd’s, proper certification of compliance with the requirements entails sufficient documentation of injury and causation, subject to audit, to justify the claim’s settlement and for the claim to be processed in accordance with insurers’ normal procedures.¹⁹⁵ In the documentation requirements, insurers expressly reserve the right to challenge as unreasonable

¹⁸⁴ *Viz.*, a qualified physician’s diagnosis and opinion that asbestos exposure was “at least a substantial contributing cause”, supported by a medical report identifying bilateral asbestos-induced pleural abnormality, or either an International Labor Organization (“ILO”) profusion reading of 1/1 or greater, or pathological evidence of asbestosis, *viz.*, patchy peribronchiolar or interstitial fibrosis with asbestos bodies: Asbestos Documentation Requirements 1, §B.2 to B.3; *ibid.*, §B.4.

¹⁸⁵ *Viz.*, a qualified physician’s diagnosis of asbestosis accompanied by a medical report containing either an International Labor Organization (“ILO”) profusion reading of 1/1 or greater, or pathological evidence of asbestosis, *viz.*, patchy peribronchiolar or interstitial fibrosis with asbestos bodies: Asbestos Documentation Requirements 1, §B.4.

¹⁸⁶ *Viz.*, a qualified physician’s diagnosis of diffuse pleural thickening and that physician’s opinion that asbestos exposure was at least a substantial contributing cause of the disease: Asbestos Documentation Requirements 1, §B.5.

¹⁸⁷ *Viz.*, a qualified physician’s diagnosis of pleural plaques and that physician’s opinion that asbestos exposure was at least a substantial contributing cause of the condition). In addition, a pleural plaque claim is not reimbursable (and does not properly contribute to exhaustion of underlying limits) unless it is governed by the law of a jurisdiction that allows recovery for pleural plaque claims: Asbestos Documentation Requirements 1, §B.5.

¹⁸⁸ Asbestos Documentation Requirements 1, App. 1. Dr. Ray Harron; Dr. Richard S. Kuebler; Dr. Phillip Howard Lucas; Dr. Larry M. Mitchell; Dr. Mark Schiefer; Dr. James V. Scutero; Dr. Jay T. Segarra: *ibid.*

¹⁸⁹ Asbestos Documentation Requirements 1, §C, first sentence.

¹⁹⁰ *Viz.*, For each claimant, a sworn or verified statement by the alleged injuree (or other witness with personal knowledge) that a particular type of product of the EquitasRe-assured-at-Lloyd’s was present and in use during the relevant period and at the relevant worksite (“building materials” is insufficient): Asbestos Documentation Requirements 1, §C.1.a.

¹⁹¹ For each claimant, a sworn or verified statement by the claimant (or other witness with personal knowledge) that the alleged injuree was present at the EquitasRe-assured’s-at-Lloyd’s premises during a time that asbestos or asbestos-containing products were also present at the site, or that the claimant was present when the EquitasRe-assured-at-Lloyd’s conducted operations at the site which involved the use or presence of asbestos or asbestos-containing products: Asbestos Documentation Requirements 1, §C.1.b.

¹⁹² Asbestos Documentation Requirements 1, §C.3.

¹⁹³ Asbestos Documentation Requirements 1, §C.2. Stating that a claimant “may have been exposed” to a relevant product is not sufficient: *ibid.*

¹⁹⁴ Asbestos Documentation Requirements 1, §C.2; *ibid.*, App. 2. The trades are asbestos mining; asbestos fabric milling and manufacture of other asbestos products such as asbestos insulation products, asbestos cement, asbestos clutch and brake linings; manufacture of asbestos containing gas masks; asbestos construction insulators; asbestos sprayers; pipe insulators, pipe “ladders”, pipe fitters, steam fitters, boiler makers and installers, and plumbers; steam-era locomotive manufacture and maintenance; construction of steam propelled ships: *ibid.*

¹⁹⁵ Asbestos Documentation Requirements 1, §D.

any settlement amount, reserve all other available policy rights and coverage defenses, and declare that they may in the future develop “specific guidelines” concerning reasonable settlement amounts depending upon the severity of the injury and “other relevant factors”, which may include whether or not an asbestosis injuree is impaired, and the length of occupational exposure to asbestos of a lung cancer injuree; and also guidelines concerning reasonable values for inventory settlement agreements;¹⁹⁶

(5) certification (Part F): for each asbestos bodily injury claim for reimbursement or to exhaust underlying limits, the EquitasRe-assured-at-Lloyd’s must provide the claimant’s name, claim number, jurisdiction, status (open or closed), dates of first and last exposure, the alleged disease, date of diagnosis, date of death if applicable, and the amount of indemnity and expense paid.¹⁹⁷ The EquitasRe-assured-at-Lloyd’s is required to also provide a sworn statement in standard form¹⁹⁸ that it or its representatives maintain supporting evidence fully complying with the Documentation Requirements, acknowledging that reimbursement of the submitted claims will be made in reliance on the certification, and acknowledging that insurers have the right to inspect and audit supporting evidence and that such evidence will be made available for their review on their request.¹⁹⁹

documentation requirements for asbestos-related inward reinsurance claims generally

2.26 As part of its asbestos liabilities management “strategy”,²⁰⁰ Equitas Re has promulgated “Reinsurance Documentation Requirements”²⁰¹ for asbestos-related inward reinsurance claims (colloquially “RDRs”; in this Edition, “Inward Reinsurance Documentation Requirements 1”, presently the subject of bad-faith litigation in the US;²⁰² Equitas Re has recently conducted a full review of such liabilities²⁰³). Closely following Asbestos Documentation Requirements 1²⁰⁴ (which preceded them), they were introduced December 21, 2001 in response to an “escalating volume of reinsurance claims pertaining to settlements of asbestos bodily injury claims” presenting a “serious challenge to the reinsurance claims settlement process”.²⁰⁵ They apply to all reinsurance

¹⁹⁶ Asbestos Documentation Requirements 1, §D.

¹⁹⁷ Asbestos Documentation Requirements 1, §F.

¹⁹⁸ At Asbestos Documentation Requirements 1, App. 3.

¹⁹⁹ Asbestos Documentation Requirements 1, §F. Insurers “intend to conduct audits to monitor the accuracy of certifications, and may adjust reimbursements with respect to an EquitasRe-assured-at-Lloyd’s or take other action as appropriate where an audit reveals that a certification is inaccurate”: *ibid.*

²⁰⁰ See p.64.

²⁰¹ See recently for example Equitas Holdings RA fye March 31, 2002, p.12-13 (Claims Director’s review); Equitas Group June 21, 2002 press release (EQ36; “Equitas announces financial results for year ended 31 March 2002”), Commentary on Equitas’ financial results for the year ended 31 March 2002:-

Last year, London Market insurers expanded on the DRs by adopting what are known as reinsurance documentation requirements (RDRs) for asbestos claims presented by cedants which purchased reinsurance coverage from Lloyd’s syndicates and other London Market insurers. Equitas believes the DRs and RDRs will have a significant impact on the reimbursement of claims filed by unimpaired persons.

²⁰² See p.64.

²⁰³ Equitas Holdings RA fye March 31, 2002, p.5 (“Chief Executive Officer’s review):-

During the year we undertook a review of all inwards reinsurance asbestos liabilities on a more comprehensive basis than had been done at any time since the Lloyd’s Reserving Project. Our conclusion was that this category of reserves was overstated in terms of ultimate gross losses, but that actual payment of inwards reinsurance claims would be somewhat more rapid than had been previously forecast.

²⁰⁴ See p.64.

²⁰⁵ Inward Reinsurance Documentation Requirements 1, §A. *Ibid.*:-

Insurers need to settle claims consistent with policy terms and conditions and in a reasonable and businesslike manner. Failure to do so can result in the payment of unmeritorious claims, which itself simply encourages further unmeritorious claims. Because of this growing problem, Reinsurers must be able to assess whether asbestos bodily injury claims are valid and meritorious and covered under the reinsurance contract.

claims for asbestos bodily injury claims settled between the claimant and the cedant's assured on or after January 31, 2001.²⁰⁶ Intended to "assist cedants in the presentation of valid claims to the Reinsurers", and not to alter the terms of existing reinsurance contracts,²⁰⁷ they have a formal purpose, *viz.*, to ensure to inward reinsurers that ceded asbestos bodily injury claims are within the scope of both the original policy and the reinsurance contract, and that such claims are being settled by cedants in a reasonable and businesslike manner: "Only those ceded asbestos bodily injury claims that fall within these parameters will be considered valid."²⁰⁸ The requirements are not intended to exceed US evidence requirements for an alleged injuree ("claimant") to establish a *prima facie* case that he or she suffers from an asbestos-induced bodily injury for which the cedant is responsible; if a different standard of proof applies in a particular relevant jurisdiction, the requirements may be modified accordingly.²⁰⁹ Reinsurers expressly reserve the right, "in light of their experience in administering these Reinsurance Documentation Requirements, additional relevant information, changes in applicable law, changes in the behavior of claimants or their counsel, or other circumstances", to amend them so as to require additional or different documentation, or make them applicable to other categories of claims.²¹⁰

latitude

- 2.27 Inward Reinsurance Documentation Requirements 1 are not necessarily uncompromising. Inward reinsurers indicate that they "will" reserve the right to confirm compliance with the requirements by subsequent "audit", and to seek reimbursement or set-off if compliance is not confirmed,²¹¹ or else will request the cedant to produce information to confirm compliance, in which event Inward Reinsurance Documentation Requirements 1 constitute advance notice of the information required to confirm that the asbestos bodily injury claims were covered under both the original policies and under the reinsurance contracts.²¹² Should the claiming cedant have agreed to pay or reimburse settlements of one or more asbestos claims not meeting the documentation requirements, Reinsurers indicate that they reserve the right to deny a reinsurance recovery for such claims in the event they determine there is not sufficient evidence of injury and causation, but indicate that they will "consider" the merits of the reinsurance claim if the cedant has "independently reviewed" such claims and satisfied itself of sufficient evidence of injury and causation despite noncompliance.²¹³ When seeking a reinsurance recovery, the cedant must separately identify and report such claim, and certify in particular terms²¹⁴ that it has a rea-

To the extent they properly address the process, the RDRs are legitimate. To the extent they address the mere volume, they are presumably impeachable.

206 Inward Reinsurance Documentation Requirements 1, §H.

207 Inward Reinsurance Documentation Requirements 1, §B.

208 Inward Reinsurance Documentation Requirements 1, §B.

209 Inward Reinsurance Documentation Requirements 1, §J.

210 Inward Reinsurance Documentation Requirements 1, §G.

211 Inward Reinsurance Documentation Requirements 1, §B.

212 Inward Reinsurance Documentation Requirements 1, §B.

213 Inward Reinsurance Documentation Requirements 1, §F. *Ibid.*: "By way of example, the cedant's assured may submit an asbestosis claim supported by an 11.() reading of 1/0 with corroborating evidence of asbestosis."

214 See Inward Reinsurance Documentation Requirements 1, §I, and the form of certification at *ibid.*, App. 3. Inward Reinsurance Documentation Requirements 1, §I:-

Where the cedant is proceeding by way of Certification, for all asbestos bodily injury reinsurance claims submitted for reimbursement or to exhaust underlying limits, the cedant will maintain and provide to Reinsurers a list setting forth the following, at a minimum, for each individual asbestos claim: the claimant's name, claim number, jurisdiction, status (open or closed), dates of first and last exposure, the alleged disease and the date of diagnosis, date of death if applicable, and the amount of indemnity and expense paid. The list will be accompanied by a certification (in the form attached as Appendix 3) that, to the best of the cedant's knowledge after reasonable inquiry, that the claim and supporting documentation meet the standards set forth in these Reinsurance Documentation Requirements. Reinsurers intend to conduct audits to monitor the accuracy of certifications, and may adjust reimbursements with respect to a cedant or take other action as appropriate where an audit reveals that a certification is inaccurate."

Ibid., App. 3 certification:-

On behalf of _____ (the "Cedant"), I hereby certify that, for each claim submitted herewith for reinsurance payment pursuant to Reinsurers Reinsurance Documentation and Claim Procedure Requirements for Asbestos Bodily Injury Reinsur-

sonable basis to conclude that such claims are adequately supported by evidence of injury and causation.²¹⁵ The documentation requirements also require the cedant to specify the area(s) of noncompliance with *ibid.* for each claim, and to state the basis for its position that the claim was covered under the original policy despite the noncompliance.²¹⁶

the RDRs' principal provisions

2.28 Inward Reinsurance Documentation Requirements 1, substantially similar to Asbestos Documentation Requirements 1,²¹⁷ have three principal parts:-

(1) general requirements (Part C): whether claiming reimbursement or to exhaust underlying limits, self-insured retentions, or deductibles underlying the original policies, the cedant's documentation must indicate the type of each underlying claim (such as product liability, completed operations or premises liability). "Consistent with the requirements of reasonable and businesslike claims settlement practices, for ceded asbestos bodily injury claims", the requirements seek "proof" that the claiming cedant had access to, and also the right to audit, a variety of data concerning the alleged injuree, including his name and social security number; a copy of the complaint if the case is in litigation; the letter or other writing making the claim if not in litigation; the release; a copy of the cheque provided to him or his representative; evidence of the gross amount payable on the claim gross of attorney's fees or expenses; and evidence of amounts that the alleged injuree received from other allegedly responsible parties (if ordinarily obtainable in discovery in the relevant forum);²¹⁸

(2) medical documentation (Part D): these are substantially as for Asbestos Documentation Requirements 1, with the same seven named physicians;²¹⁹

(3) product identification and exposure documentation (Part E): for ceded asbestos bodily injury claims, the cedant is required, "[c]onsistent with the requirements of reasonable and businesslike claims settlement practices" to furnish reinsurers with "proof" that it has taken "appropriate steps" to ensure that asbestos bodily injury claims were supported by sufficient documentation that the alleged injuree was exposed to an asbestos-containing product "of" the direct assured. Evidence of engagement in trades specified in the requirements constitutes sufficient evidence of exposure.²²⁰ For premises/operations claims, "proof" is required of exposure to asbestos "in connection with" the direct assured's premises or operations. Specific supporting documentation is required for each of product claims²²¹ and premises/operations claims²²² substantially as in As-

ance Claims (the "Reinsurance Requirements") (a copy of which is attached hereto), the Cedant or its representatives take appropriate steps to ensure that the asbestos bodily injury claims comply with the Reinsurance Requirements. The Cedant acknowledges that any payment by Reinsurers of the reinsurance claims submitted herewith will be made in reliance on this Certification. Further, the Cedant acknowledges that Reinsurers have the right to inspect and audit the Cedant with respect to the claims to which this Certification relates, and that all information relating to the claims and the subject matter of the Reinsurance Requirements will be made available for Reinsurers' review upon their request. I further certify that, to the best of the Cedant's knowledge after reasonable inquiry, each asbestos claim for which reinsurance payment is requested complies with the medical, product, and exposure standards set forth in the Reinsurance Requirements. I have been authorized to make this certification on behalf of [Cedant] by _____, an officer and director of [Cedant].

²¹⁵ Inward Reinsurance Documentation Requirements 1, §F.

²¹⁶ Inward Reinsurance Documentation Requirements 1, §F.

²¹⁷ See p.64.

²¹⁸ Inward Reinsurance Documentation Requirements 1, §C.

²¹⁹ See Inward Reinsurance Documentation Requirements 1, App. 1: Dr. Ray Harron; Dr. Richard S. Kuebler; Dr. Phillip Howard Lucas; Dr. Larry M. Mitchell; Dr. Mark Schiefer; Dr. James V. Scutero; Dr. Jay T. Segarra.

²²⁰ Inward Reinsurance Documentation Requirements 1, App. 2. The trades are asbestos mining; asbestos fabric milling and manufacture of other asbestos products such as asbestos insulation products, asbestos cement, asbestos clutch and brake linings; manufacture of asbestos containing gas masks; asbestos construction insulators; asbestos sprayers; pipe insulators, pipe "ladders," pipe fitters, steam fitters, boiler makers and installers, and plumbers; steam-era locomotive manufacture and maintenance; construction of steam propelled ships: *ibid.*

²²¹ See Inward Reinsurance Documentation Requirements 1, §E.1(a). *Ibid.*: "For each claimant, a sworn or verified statement by the claimant (or other witness with personal knowledge) that a particular type of product of the Assured was present

bestos Documentation Requirements 1. “The cedant will have practices and procedures that will permit the cedant to have access to, including rights to audit, documentation that will confirm that each asbestos claim meets the requirements of Subsections E.1, 2 and 3 below”²²³ together with the alleged injuree’s comprehensive work history²²⁴ and a sworn or verified statement from the alleged injuree as to his exposure.²²⁵

PROCESSING THE CLAIM

regulation

- 2.29** Regulation of claims processing at Equitas Re is to be considered from four points of view: (1) Equitas Re as handler of claims on itself as RRC 4, §3 reinsurer (any claim on an EquitasRe-reinsured SYA participant is necessarily a claim on Equitas Re personally). FSA does regulate UK insurance companies, but has promulgated scant claims handling rules.²²⁶ Neither Equitas Re nor Equitas Ltd. is a member of the ABI (which does have claims handling codes); (2) Equitas Re as RRC 4, §9 handler of claims on insurance and conventional RTC sold by EquitasRe-reinsured SYA participants. The FSA does not presently²²⁷ regulate the claims handling functions of run-off companies; (3) Equitas Re in the context of the Lloyd’s enterprise. Rulebook at Lloyd’s provisions concerning claims handling by managing agencies²²⁸ appear to have no application to Equitas Re: self-regulators-at-Lloyd’s and Equitas Re have averred that Equitas Re is not part of the Lloyd’s enterprise and not within self-regulators’-at-Lloyd’s self-regulatory jurisdiction; (4) other regulation. Equitas Re’s present apparent Claims Handling Guidelines (undated) indicate the importance it attaches to compliance with relevant US state law, including generally,²²⁹ on claims handling,²³⁰ relevant time limits,²³¹ responding to the claimant’s relevant

and in use during the relevant period and at the relevant worksite. Reference to a wide category of products (such as “building materials”) is insufficient.”

- ²²² See Inward Reinsurance Documentation Requirements 1 §E.1(b). *Ibid.*: “For each claimant, a sworn or verified statement by the claimant (or other witness with personal knowledge) that the claimant was present at the Assured’s premises during a time that asbestos or asbestos-containing products were also present at the site, or that the claimant was present when the Assured conducted operations at the site that involved the use or presence of asbestos or asbestos-containing products.”

- ²²³ Inward Reinsurance Documentation Requirements 1, §E.

- ²²⁴ Inward Reinsurance Documentation Requirements 1, §E.3. The history must specify all employers and, for each employer, location and dates of employment, occupation, and job duties: *ibid.*

- ²²⁵ Inward Reinsurance Documentation Requirements 1, §E.2. *Ibid.*:-

A sworn or verified statement by the claimant (or other witness with personal knowledge) that specifically describes how the claimant was allegedly exposed to asbestos contained in the Assured’s product (or, for premises/operations claims, how the claimant was exposed in connection with the Assured’s premises or operations) and during what period of time. If the claimant has been engaged in one of the occupations listed in Appendix 2, evidence of engagement in that occupation is sufficient to document how exposure occurred. Otherwise, the cedant will require evidence of the specific circumstances of exposure. Broad, indefinite statements purporting to establish a claimant’s potential exposure to asbestos or an asbestos-containing product (e.g., that a claimant “may have been exposed” to a product) are not sufficient.

- ²²⁶ See for example: FSA Guidance P2; DTI Prudential Guidance 1996.

- ²²⁷ FSA rules directly applicable to run-off companies are envisaged in FSA Consultation Paper 97.

- ²²⁸ See for example Code: UK Personal Lines Claims.

- ²²⁹ See Equitas Claims Unit: Claims Handling Guidelines (undated), preamble: “The purpose of these Claims Handling Guidelines is to promote the prompt and equitable handling and settlement of claims by Equitas. Where U.S. claims are involved. It may be necessary to consult the applicable provisions of state statutory and regulatory law.”

- ²³⁰ See Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.4: “Where we believe an assured’s agent is not complying with applicable state laws on claims handling, and we are able to identify the assured’s agent, we may document our belief in writing and communicate it to the assured or its agent for redress and to state regulatory authorities where appropriate.”

- ²³¹ See Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.6: “Where it is unclear whether a communication by the assured or its agent actually requests defence and/or indemnity under the policy or where the assured does not provide the information described in 2.1.5, or other essential information, we may request additional information from the assured or its agent within 10 business days of our receipt of the communication, or within the time required by state statute or regulation.”

communications,²³² keeping the claimant informed,²³³ and that Equitas Re “should” advise the claimant of his rights to seek advice.²³⁴

Equitas Re’s approach to claims processing

overview

- 2.30 Equitas Re handles each claim by an EquitasRe-assured-at-Lloyd’s on its own personal behalf as RRC 4, §3 reinsurer principal, and on behalf of each relevant EquitasRe-reinsured SYA participant as his *ibid.*, §9 run-off agent. Whatever its capacity, a valid claim under a valid insurance contract founds the assured’s right to payment, not the insurer’s right not to pay.²³⁵ Aspiring to “efficient and skilful”²³⁶ claims disposition, Equitas Re has described its approach to the claims management functions envisaged in *SOD*²³⁷ as (for example) “Be realistic; Avoid litigation whenever possible; Meet directly with the other party; Finality”;²³⁸ “fair but firm”;²³⁹ preferring negotiation to litigation but not afraid of the latter²⁴⁰ — Equitas Re appears not to consider itself a latter-day Cuthbert Heath²⁴¹ after the 1906 San Francisco earthquake. Equitas Re has promul-

232 See Equitas Claims Unit: Claims Handling Guidelines (undated), §2.2.1: “When we receive from an assured or its agent a communication that reasonably indicates that a response is expected, we should respond promptly, i.e., within 10 business days of receipt or as required by state statute or regulation.”

233 See Equitas Claims Unit: Claims Handling Guidelines (undated), §4.5: “The assured or its agent should be kept advised of the status of our investigation no less frequently than every 30 or 45 days thereafter, depending upon the requirements of state statute or regulation.”

234 See Equitas Claims Unit: Claims Handling Guidelines (undated), §4.2: “Where appropriate, the assured or its agent ... should be informed that the assured may seek the advice of the relevant U.S. state insurance department.”

235 See for example *Medical Defence Union Ltd. v Department of Trade* [1979] 1 Lloyd’s Rep. 499, 506 (Megarry V-C; “Where a person insures, I think that he is contracting for the certainty of payment in specified events, and not merely for the certainty of proper consideration being given to his claim that a discretion to make a payment in those events should be exercised in his favour.”).

236 Equitas Holdings RA fpe September 4, 1996, p.3 (Chairman’s Statement): “A critical area for Equitas’ success will be the efficient and skilful resolution of claims”.

237 *SOD*, p.85:-

Equitas will manage claims on behalf of the syndicates it reinsures and will pay claims in respect of their insurance obligations direct to policyholders or, where such payments are to be made from any trust which Equitas is obliged to maintain, in accordance with the terms of that trust. An Equitas Claims Unit (ECU) has been established which will be responsible for these activities. Its key staff have extensive knowledge of non-APH claims adjusting. The existing Lloyd’s Specialist Claims Unit (SCU), which was set up in January 1994 to adjust APH claims on behalf of the Lloyd’s market, will become part of the ECU and continue to handle APH claims. This in-house expertise will be further expanded as the ECU takes on overall responsibility for adjusting all 1992 and prior claims.

238 Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal* 1998, p.62, 66-7.

239 Equitas Holdings RA fpe September 4, 1996, p.3 (Chairman’s Statement):-

Our policy is to be fair but firm with valid claims being resolved promptly. Invalid claims will be vigorously resisted. While we intend to keep Reinsured Names apprised of general claims developments, we will not normally comment on the outcome of claims settlements. Apart from breaking commercial confidentiality, we do not believe that providing details of this nature would be in the interest of Equitas, Reinsured Names or underlying policyholders.

And see *ibid.*, p.8 (Chief Executive Officer’s Review):-

We will resolve valid claims with a minimum of delay and friction. We intend to employ responsive claims handling practices that emphasise principal to principal settlements and which minimise the use of litigation. ... However, Equitas will resist invalid claims with all the legal means at our disposal.

And see *SOD*, p.85:-

In paying claims, Equitas will take a fair but firm approach. Its policy will be to assess the assured’s claim for coverage in the light of the facts, the wording of the applicable insurance or reinsurance policy and the relevant law.

240 See for example Equitas Holdings RA fye March 31, 1998, p.7-8 (Chief Executive Officer’s review):-

The Group’s ‘fair but firm’ claims management policy remains unchanged. Equitas will pay valid claims promptly, both to fulfil policy obligations and to reduce unnecessary costs. Invalid claims are resisted by all means at our disposal. ... We place great emphasis on negotiation, rather than litigation, and we attempt to discuss issues directly with policyholders whenever feasible. ... More than 95 per cent of the claim paid by Equitas have been settled through negotiation rather than court judgments. On the other hand, we will vigorously litigate where necessary to defend our position, either with reference to a specific claim or to establish a more general point of law.

241 A. Brown, *Cuthbert Heath — Maker of the Modern Lloyd’s of London* (C.E. Heath Plc, 1993), p.95:-

gated Equitas Claims Unit: Claims Handling Guidelines (undated), “to promote the prompt and equitable handling and settlement of claims by Equitas”.²⁴² Centralisation²⁴³ at Equitas Re of claims handling is said to have had the initial effect of expediting settlement of claims. Concern was initially expressed²⁴⁴ that in paying claims Equitas Re would favour current customers of current SYA participants at Lloyd’s; it does appear to have a class-based approach.²⁴⁵

investigating and adjudicating the claim

- 2.31 Equitas Re has indicated that it will consider valid a claim which identifies the specific policy, is within all policy terms and conditions, is not subject to policy exclusions, is presented in writing, has a verifiable amount, and is supported by documentation of all material facts and circumstances sufficient to permit Equitas Re to determine that the claim is payable under that specific policy.²⁴⁶ In particular, it often requires full identification of all insurance transaction beneficiaries where they are not named but merely referred to as “various” or “et al.” in the policy or certificate. Equitas Re indicates that it needs the claimant’s “full cooperation ... to properly handle and resolve a claim”,²⁴⁷ and “should” begin investigating the claim within ten business days of its receipt of the claim and be completed within thirty days unless the investigation cannot “reasonably be completed” within that time, and will keep the claimant “or its agent” “reasonably advised”.²⁴⁸ Equitas Re (which tends not to comment on individual cases²⁴⁹) refutes the notion of deliberate delay in the adjudication process,²⁵⁰ including to maximise investment in-

Philip Heath has recalled being told by Cuthbert how ‘lawyers employed by American companies descended on the City with the express purpose of avoiding payment of as many claims as possible.’ Such methods were not for him. He simply sent a cable to his San Francisco agent: ‘Pay all our policy-holders in full irrespective of the terms of their policies.’

If it ever happened, the stunt was presumably (and nowadays would certainly be) actionable by Heath’s SYA participant principals. It presumably also jeopardised relevant outward reinsurance.

242 *Ibid.*, preamble.

243 On claims handling arrangements at Equitas Re before RRC 4 was executed, see for example Mkt. Bn. Y099, January 10, 1996(“Equitas claims handling arrangements”).

244 See *S&M*, §54 (p.20):-

[W]e have heard the fear expressed that the “claims culture” of Lloyd’s will be perpetuated in Equitas and that claims will be settled with the interests of the on-going market in mind, rather than those of the Names who have been reinsured by Equitas. This is an understandable fear and one which, we are told, has been expressed forcibly by Names’ representatives to and understood by the present Directors and management of Equitas. As a matter of law, the Directors and management of Equitas are responsible to Equitas, its shareholders, employees and (in certain circumstances) creditors only and to no-one else, least of all the on-going Lloyd’s market, and they will surely be aware of that.

245 Equitas Holdings RA fye March 31, 1998, p.8 (Chief Executive Officer’s review):-

While Equitas deals with hundreds of thousands of potential claims, in many classes of business a relatively modest number of claims — generally 50 to 100 — represent up to 90 per cent of the estimated losses in that class. By focusing talent and resources on these most material claims, we believe we can significantly influence outcomes and overall results.

246 Equitas Claims Unit: Claims Handling Guidelines (undated), §3.2(a)-(f). And see for example FSA Guidance P2, § B6: “Appropriate systems and procedures should be in place to assess the validity of notified claims by reference to the underlying contracts of insurance and reinsurance treaties.” See similarly DTI Prudential Guidance 1996, §B6.

247 Equitas Claims Unit: Claims Handling Guidelines (undated), §2.4.1. *Ibid.*, §2.4.2: “The assured’s full cooperation will promote a speedy and thorough investigation”.

248 Equitas Claims Unit: Claims Handling Guidelines (undated), §2.4.2. *Ibid.*: “The need for additional time may be particularly acute in certain types of claims, e.g., asbestos, pollution and health hazard, which usually involve many policies and often are lengthy and complex”. See generally for example FSA Guidance P2, §B5: “Appropriate systems and procedures should be in place to ensure that claim files without activity are reviewed on a regular basis. For example, the use of a ‘diary’ system should identify areas of inactivity, thereby prompting the claims handler to examine the file and reassess the priority of the action required”. See similarly DTI Prudential Guidance 1996, §B5.

249 Equitas Holdings RA fye March 31, 1998, p.8 (Chief Executive Officer’s review; “For commercial reasons it is inappropriate to comment on individual claims developments”).

250 Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal* 1998, p.62, 64:-

[B]efore Equitas began operations some in the market might have held the suspicion that we would be slow to pay claims and hang on to our money to produce investment income and thereby produce favourable accounts. Let me be very clear, that is not our strategy. ... My vision of success at Equitas is resolving claims as soon as possible since anytime we agree to a settlement I believe is a “Win/Win” situation. ... Let me be unequivocal: we are here to resolve claims — period.

See similarly Mealey’s Seminar Friday 16th November 2001 — Presentation By Scott Moser Equitas Claims Director at *Mealey’s Litigation Report: Insurance*, December 11, 2001, p.27, 28:-

come.²⁵¹ Equitas Re indicates that it “should” accept or deny a claim within twenty business days of receiving proof of loss, “unless our investigation requires additional time”, in which event it “should” advise the claimant within those twenty days that additional time is needed, explain why, and estimate how much more time will be needed, and “should” keep the claimant advised at least every “30 or 45 days” thereafter²⁵² — whether Equitas Re’s delay in adjudicating is actionable depends on the jurisdiction;²⁵³ *SOD* envisaged that the rate at which claims would be paid would fall over time.²⁵⁴ Equitas Re “should” draw to the claimant’s attention “potential impediments to coverage whenever they appear to arise from the claim information”.²⁵⁵ Where Equitas Re has “insufficient facts to make a coverage determination”, it may issue a “more general reservation of rights”.²⁵⁶ In forming its view, Equitas Re indicates that it may respond by requesting additional information,²⁵⁷ reserve rights and defences under the policy, dispute some aspect of the alleged liability or the quantum of the claim, or deny in writing²⁵⁸ a claim based on applicable law, operative facts, and the policy terms, conditions and exclusions.²⁵⁹ Presumably Equitas Re has systems in place to properly record all notified data,²⁶⁰ and liaise with relevant other Equitas Re departments.²⁶¹ Depending on the transaction, it is not unusual for London

Some ... have held the suspicion since before Equitas began that we would be slow to pay claims — that we would want to hold on to our money for as long as possible to produce investment income. That is not and never has been our strategy. Instead, our vision of success is resolving claims as soon as possible — but, of course, at the right price. Often we are presented with claims which we believe are covered. We adjust and pay those claims as promptly as we can. On the other hand, we receive many claims where coverage is in doubt. In those instances, it is still our desire to achieve a resolution as quickly as possible.

And see *NAIC Review 1999*, p.36: “Specific changes made by Equitas include a more organized approach toward claims and reinsurance. Claims are receiving executive attention from the most serious down in an effort to close larger claims sooner.”

²⁵¹ Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal 1998*, p.62, 64:-

Of that vast amount of money that we have paid out, less than 1% has been as a result of court judgements and in all the rest, agreement was achieved with the claimant. ... [O]f course, we want to make as much investment return as possible on the assets we hold but I consider we make better return by resolving claims than by holding on to the money and investing it. Our accounts through March 1997 show that we earned about 6.5% on our money last year. As this money is worth far more to our claimants I am anxious to deal with claimants who recognise the benefit to themselves of quick settlements

See incidentally Equitas Holdings RA fye March 31, 2001, p.13 (Financial review): “Claims are expected to be settled later than previously assumed, so that we will be able to earn a higher investment return”.

²⁵² Equitas Claims Unit: Claims Handling Guidelines (undated), §4.5.

²⁵³ See for example in principle 215 Ill. Comp. Stat. Ann. 5-155 (1999), providing various remedies for “vexatious and unreasonable delay”, mentioned in D.K. Dailey and L.M. Bouldan, *First Party Bad Faith in The Brief*, vol. 29, no. 2 (Winter 2000), p.44 at p.46.

²⁵⁴ See for example *SOD*, p.84: “The rate of claims payment is expected to be high in the early years, reflecting the significant proportion of short-tail business being reinsured into Equitas. Claims payments are expected to fall over time as the proportion of long-tail claims increases.”

²⁵⁵ Equitas Claims Unit: Claims Handling Guidelines (undated), §4.4.

²⁵⁶ Equitas Claims Unit: Claims Handling Guidelines (undated), §4.3.

²⁵⁷ And see Equitas Claims Unit: Claims Handling Guidelines (undated), §2.1.6: “Equitas Re has indicated that where it is unclear if a claimant’s communication is requesting defence and or indemnity under the policy, or if the claimant does not provide the information described in 2.1.5, or other essential information, we may request additional information from the assured or its agent within 10 business days of our receipt of the communication, or within the time required by state statute or regulation.”

²⁵⁸ Equitas Claims Unit: Claims Handling Guidelines (undated), §4.2. *Ibid.*: “A written response should be issued to the assured or its agent stating presently identified reasons why the claim may not be covered in whole or part based on the claim presentation and other information known to us.”

²⁵⁹ Equitas Claims Unit: Claims Handling Guidelines (undated), §4.1(b)-(e).

²⁶⁰ See generally for example DTI Prudential Guidance 1996, §2; FSA Guidance P2, unnumbered box paragraph immediately before *ibid.*, §10 (“Suitable controls, systems and procedures should be in place to ensure adequate and accurate information is appropriate and promptly recorded to enable a proper assessment to be made of the ultimate cost of all claims or potential claims”. *Ibid.*, B1: “Appropriate systems and controls should be in place to ensure that all liabilities or potential liabilities notified to the insurer are recorded promptly and accurately. Accordingly, the systems and controls in place should ensure that a proper record is established for each notified claim.”

²⁶¹ FSA Guidance P2, §16: “The claims handling department should maintain regular liaison with other key functions within the insurer.” And see similarly DTI Prudential Guidance 1996, §2.7.

companies on the risk to wait until ECU has adjudicated the claim and then make their own independent decisions; sometimes there is collaborative adjudication.

communicating with the claimant

- 2.32 Equitas Re has indicated that when it receives a communication from a claimant “reasonably” indicating that a response is expected, it “should respond promptly, i.e., within 10 business days of receipt or as required by state statute or regulation”;²⁶² that if it cannot respond within that time, it “should” advise the claimant that it needs more time and “provide our reasons”, and state what additional information it believes it requires from the claimant or other parties to enable it to respond and “where possible, provide an estimate of the additional time required to analyze the information after receipt”.²⁶³ The nature of the relationship changes when the claimant starts legal proceedings against Equitas Re.²⁶⁴

set-off

- 2.33 Experience at Equitas Re appears to be that ECU adjusts the claim, after which Equitas Re’s central accounting department takes an interest in centralising set-off. As RRC 4, §9 run-off agent, Equitas Re has each EquitasRe-reinsured SYA participant’s power to set off.²⁶⁵ The extent to which Equitas Re itself as principal RRC 4, §6.4 assignee can take advantage of, or is subject to, set-off affecting relevant EquitasRe-reinsured SYA participants appears to have been dealt with pragmatically.²⁶⁶ Contravening the SYA-level separate contracts rule,²⁶⁷ an incident of which appears to be that set-off is capable of arising only at SYA participant level,²⁶⁸ a conven-

²⁶² Equitas Claims Unit: Claims Handling Guidelines (undated), §2.2.1.

²⁶³ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.2.2.

²⁶⁴ Equitas Claims Unit: Claims Handling Guidelines (undated), §2.2.3 (“When an assured institutes legal proceedings against its insurers, an adversarial relationship has been created and the claim will be handled with the assistance of our counsel and in accord with applicable arbitration and litigation rules and procedures”).

²⁶⁵ See RRC 4, §9.2(f). Presumably the power is to set off in accordance with lawful and reasonable practices at Lloyd’s: neither a SYA nor a syndicate contracts.

²⁶⁶ See this Chapter, fn. 269.

²⁶⁷ See for example *Barrington-Hume v AA Mutual International Insurance Co. Ltd.* [1996] LRLR 19, 22 (Clarke J):-

[T]he slip ... is a mechanism whereby the assured can be put, by means of a single contractual document, in direct and distinct contractual relations with a large number of insurers; what might seem to be a single contract is in fact a bundle of a large number of distinct contracts on the same terms except as to the amount of each individual insurer’s liability.

Touche Ross & Co. v Baker [1992] 2 Lloyd’s Rep. 207, 209-210 (Lord Mustill):-

When an underwriting agent takes a line ... for his syndicate he thereby calls into existence a bundle of individual contracts between each name and the assured, identical save as to the respective proportions taken by the names. This bundle is itself agglomerated with the other groups of contract[s] created when other syndicates take a line on the same insurance.

And see *Insurance Company v Lloyd’s Syndicate* [1995] 1 Lloyd’s Rep. 272, 274 (Colman J; reinsurance):-

Where a risk is subscribed by more than one reinsurer on identical terms save as to the proportion of the risk reinsured, each subscribing reinsurer enters into a separate contract of reinsurance with the reassured. Conduct of the reassured referable exclusively to one such contract in general has as a matter of law no bearing on any other contract. Thus, for the purposes of misrepresentation or non-disclosure of material facts including the acceptance of the risk, each reinsurer’s contract is, in general, to be dealt with quite separately from that of any other.

See also *The Zephyr* [1984] 1 Lloyd’s Rep. 58, 66 (Hobhouse J; not affected on appeal); *General Reinsurance Corporation v Forsakringsaktiebolaget Fennia Patria* [1983] Q.B. 856, 864 (Kerr LJ); *Arab Bank Plc v Zurich Insurance Co.* [1999] 1 Lloyd’s Rep. 262, 277 (Rix J; one insurance policy evidenced a bundle of separate contracts, one with each assured-at-Lloyd’s). See also *Halsbury*, vol. 25, §19, cited with approval in *Ashmore v Lloyd’s* {1} (CA; September 20, 1991; unreported; Ralph Gibson LJ); *Napier & Ettrick v R. F. Kershaw Ltd., Lloyd’s v Woodard and Wilson* [1997] LRLR 1, 7 (Hobhouse LJ). The separate contracts rule applies in the companies market too: see recently for example *Kingscroft Insurance Co. Ltd. v Nissan Fire & Marine Insurance Co. Ltd. (No. 2)* [1999] Lloyd’s Rep IR 603, 618 (Moore-Bick J). For compound error, see for example *Aneco Reinsurance Underwriting Ltd. (in liquidation) v Johnson & Higgins Ltd.* [1998] 1 Lloyd’s Rep. 565, 596 (Cresswell J: “It is of course elementary that each subscribing underwriter makes a separate contract or contracts on behalf of his syndicate or company” — syndicates do not contract).

²⁶⁸ As alluded to at RRC 4, §5.5. In any event, neither a SYA nor a syndicate is capable of contracting. Some scenarios: (1) X Co. claims on reinsurance bought from stamp A. Stamp A claims on reinsurance bought from X Co. Contractually, set-off can be effected in the ordinary way between each SYA participant and X. Financially and administratively, the set-off amount is worth calculating and doing because of the number of contractual coincidences; (2) X Co. claims on reinsurance

tion is apparently observed²⁶⁹ at Lloyd's and Equitas and in the London market generally — including in relation to insolvent²⁷⁰ outward reinsurers — whereby the insurance contracting party at Lloyd's is considered to be the syndicate, not the SYA participant or the SYA stamp, regardless how diverse the relevant stamps of its relevant YAs.

bought from stamp A, on which H is a participant. Stamp A bought nothing from X Co, Stamp B claims on reinsurance bought from X Co. Stamps A and B have only H in common. Contractually, set-off can be effected in the ordinary way between H and X Co. Financially and administratively, the set-off amount will not usually be worth calculating since the value of each of H's buying contract and selling contracts will be insignificant. It is irrelevant that stamps A and B are or are not stamps of the same syndicate. In practice at Equitas, if A and B are stamps of the same syndicate, only that commonality, rather than H, will be regarded as relevant, the parties taking the "syndicate" view: see (3) below; (3) premise as for (2) but stamps A and B have no participants in common. Contractually, set-off is impossible. In practice, (a) if stamps A and B are of the same syndicate, set-off is done at Equitas Re for administrative convenience (apparently the computer system has not yet been devised that can correlate opposing claimants' liabilities at SYA participant level); the fiction is adopted that the syndicate (rather than the SYA participant or the SYA) is the contracting party; (b) if not, there is no basis for any set-off whatever.

²⁶⁹ See for example the Explanatory Statement to the Sovereign Marine & General Insurance Co. Ltd. scheme of arrangement proposal (October 15, 1999), §6.7:-

The Provisional Liquidators have been in discussions and correspondence with Equitas on the issue of whether the members of the Lloyd's syndicates who assigned their rights [to] Equitas are the proper creditors of the Company. These discussions have not yet been concluded. The issue is of some importance because the assignments were effected prior to the Petition Date and if Equitas is deemed to be the creditor there would be no rights of set-off within the meaning of Rule 4.90 of the Insolvency Rules available to the members of the Lloyd's syndicates (who remain debtors of the Company) on a liquidation of the Company in respect of 1992 and prior years of account. Equitas has taken the position that the members of Lloyd's syndicates as assignors of claims against the Company, retain certain rights as creditors of the Company including, inter alia, the right to vote on the scheme, and has proposed that the Scheme Administrators deal with the position between Equitas, the members of the Lloyd's syndicates and the Company on the basis that the Lloyd's syndicates are the creditors and debtors of the Company and that rights of set-off should be available to them as if each Lloyd's syndicates were a separate legal entity. This approach has been adopted in a number of other schemes of arrangement of insolvent insurance companies proposed and approved by their creditors and sanctioned by the Court, although in most of these cases the schemes were implemented prior to Reconstruction and Renewal. There may also be practical difficulties surrounding the recoverability of debts from the estates of Names who are deceased and those who have ceased underwriting, as each individual member of a Lloyd's syndicate which has accepted a risk ceded to it by the Company is a debtor of the Company to the extent of his own share of each syndicate The Company might therefore be faced with a situation where the Scheme Claims of Equitas are admitted without set-off but the company's claims against the Names prove to be very difficult and costly to recover For these reasons, the scheme contains provisions at clause 5.3.3(r) (expressed as a power of the Scheme Administrators) which are intended to allow the Scheme administrators the necessary flexibility to deal with the Company's relationships with Equitas and the Names and any like scheme creditors. The Scheme empowers the Scheme Administrators to maintain more than one Scheme Account ... in respect of a single Scheme Creditor (such as Equitas Secondly, if the Scheme Creditor consents in writing, the Scheme empowers the Scheme Administrators to account for debts due to the Company from other parties (such as Names), as if they were due from the Scheme Creditor and thus eligible for set-off through inclusion in a Scheme Account. As well as permitting Equitas rights of set-off to which it might not have been entitled if a strict legal approach had been taken, the exercise of this power may result in the collection of amounts from Equitas which would have been more difficult to collect that if the Company had been forced to collect them from the individual Names.

Note the notion that conventional outward-RTC does not extricate the outward-RTCD SYA participant; also the misconception that a SYA participant has a "share" "of" a syndicate. See similarly the Explanatory Statement to the Orion Insurance Co. plc scheme of arrangement proposal (November 20, 1996), §11:-

It is likely that many thousands of separate calculations would be needed in order to assess the overall position of each member of any relevant syndicate. The Companies do not possess the detailed information required to make such calculations The Provisional Liquidators propose a practical alternative which has also been used in other insolvencies of London market companies. It is proposed that each syndicate will be treated for the purposes of set-off as being one separate "person" for all underwriting years. Within that syndicate, netting will be allowed to the extent that set-off would be available in the case of any other party. Where the affairs of one or more syndicates have been handled by the same managing [agent], or indeed where two or more such syndicates are parties to the same policies, each such syndicate will be treated separately and there will be no combining of accounts of more than one such syndicate. ... [I]n calculating the net amounts due to or by a Company, the Provisional Liquidators propose that set off will continue to be calculated on a syndicate basis as would be likely in liquidation.

Note the erroneous use of "underwriting years" to mean "syndicate years of account". Also, a syndicate is not a party to any policy: a policy is merely evidence of numerous separate insurance contracts, each one between the assured-at-Lloyd's and each individual subscribing SYA participant. EquitasRe-reinsured SYA participants' outward reinsurance bought from Orion is expressly excluded from the RRC 4, §6.4 assignment: see *ibid*.

²⁷⁰ And see in any event Insolvency Rules 1986, Rule 4.90, which provides (in part):-

(1) This Rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation. (2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other. ...

APH claims

- 2.34** Equitas Re has promulgated documentation requirements for asbestos-related direct²⁷¹ and inward reinsurance²⁷² claims. It has an asbestos “claims management strategy”²⁷³ comprising the DRs²⁷⁴ and RDRs,²⁷⁵ “close scrutiny” of inventory settlements;²⁷⁶ revisitation of CIPAs;²⁷⁷ participation by Equitas Re in insolvency proceedings;²⁷⁸ and policy buyouts.²⁷⁹ Central records were apparently not²⁸⁰ been kept at Lloyd’s until 1996. Acknowledging that APH²⁸¹ coverage issues may be substantively difficult,²⁸² Equitas Re itself directly manages APH claims.²⁸³

²⁷¹ See p.64.

²⁷² See p.68.

²⁷³ See generally for example Equitas Holdings RA fye March 31, 2002, p.2 (Chairman’s statement):-

Asbestos claims continue to be the greatest single threat to the stability of Equitas. At 31 March 2002, gross undiscounted asbestos liabilities amounted to £6.4 billion, equivalent to more than 50 per cent of the Group’s total gross undiscounted claims reserves. We are, however, encouraged by the preliminary results of the strategies that we have put in place to manage asbestos claims, and we are optimistic that they will limit the future financial threat to Equitas posed by such claims.

²⁷⁴ Equitas Group June 21, 2002 press release (EQ36; “Equitas announces financial results for year ended 31 March 2002”), Commentary on Equitas’ financial results for the year ended 31 March 2002, p.1.

²⁷⁵ Equitas Group June 21, 2002 press release (EQ36; “Equitas announces financial results for year ended 31 March 2002”), Commentary on Equitas’ financial results for the year ended 31 March 2002, p.1.

²⁷⁶ Equitas Holdings RA fye March 31, 2002, p.13-14 (Claims Director’s review); Equitas Group June 21, 2002 press release (EQ36; “Equitas announces financial results for year ended 31 March 2002”), Commentary on Equitas’ financial results for the year ended 31 March 2002: “Over the last year, Equitas has scrutinised inventory settlements proposed by policyholders and has frequently declined to approve these settlements because they permit payment of unimpaired claims that would not comply with the DRs.”

²⁷⁷ Equitas Holdings RA fye March 31, 2002, p.14 (Claims Director’s review); Equitas Group June 21, 2002 press release (EQ36; “Equitas announces financial results for year ended 31 March 2002”), Commentary on Equitas’ financial results for the year ended 31 March 2002:-

Equitas has terminated a coverage in place agreement with one policyholder based on its terms and filed suit against the policyholder to seek a declaration that, under applicable law, claims should be allocated to policies in a manner that is substantially more favourable to insurers than that provided for in the agreement. Equitas also commenced a proceeding in the bankruptcy of another policyholder, asserting that its proposed reorganisation plan breached an existing coverage in place agreement. While a trial court has rejected that challenge as premature, it has emphasised that the final reorganisation plan must respect London Market insurers’ rights under the coverage in place agreement.

See RRC 4, §9.2(a) etc.

²⁷⁸ Equitas Group June 21, 2002 press release (EQ36; “Equitas announces financial results for year ended 31 March 2002”), Commentary on Equitas’ financial results for the year ended 31 March 2002:-

Equitas seeks to participate actively in asbestos bankruptcies to achieve fair and equitable results that do not impose unwarranted liabilities on insurers. The Group has retained national bankruptcy counsel, appointed special counsel in several major bankruptcies, is insisting that it have the opportunity to participate in policyholders’ negotiations to resolve the bankruptcies and is preparing to litigate key issues that will arise in many of these bankruptcy proceedings.

²⁷⁹ Equitas Holdings RA fye March 31, 2002, p.14-15 (Claims Director’s review); Equitas Group June 21, 2002 press release (EQ36; “Equitas announces financial results for year ended 31 March 2002”), Commentary on Equitas’ financial results for the year ended 31 March 2002:-

Equitas negotiated policy buyouts with three policyholders with significant asbestos liabilities in the past year. These buyouts extinguished all current and future claims from these policyholders. Additionally, as part of the Group’s strategy to commute the reinsurance asset, inwards asbestos liability is routinely commuted as well.

²⁸⁰ See for example contemporaneously Mkt. Bn. Y190, March 25, 1996, (“Advising of APH LMX claims”). *Ibid.*, p.1-2:-

There are gaps in the LCO APH LMX claims advising service that exist for historical reasons. When LUNCO was established in 1969 it only handled claims from that year of account onwards whilst LACC never entered and advised APH LMX claims. As a result, these claims are still advised to all underwriters by the brokers concerned. Plans have now been developed by LCO and the Equitas Claims Handling Steering Group to create a comprehensive central claims recording and advising service for this class of claims covering all years of account. ... Analysis undertaken by Equitas staff indicates that this centralisation of claims advising is expected to lead to considerable improvements in efficiency within the Market and to subsequent cost savings which will far outweigh the cost of both the backloading exercise and the ongoing LCO costs. These savings will accrue not only to brokers but also to managing agencies and licensed run-off companies.

²⁸¹ See for example Equitas Holdings RA fye March 31, 1998, p.8 (Chief Executive Officer’s review): “When dealing with APH matters we generally seek to commute all coverage with a given policyholder in order to deal definitively with all current and potential exposures.”

²⁸² See for example Equitas Holdings RA fye March 31, 1998, p.7 (Chief Executive Officer’s review): “In many cases, especially those involving APH claims, neither coverage nor cost issues are clear-cut. Our strategy here is to resolve these claims at the earliest appropriate opportunity, providing that the settlement cost is appropriate to the claim.”

duty to defend

- 2.35 Equitas Re has indicated that where an assured-at-Lloyd's requests a defence under a policy, it "should" communicate with him or his agent stating its position, and "[i]f the policy contains an applicable duty to defend the assured, we will pay or reimburse our syndicates' several shares of the appropriate defence costs under the policy and applicable law".²⁸⁴

logistics

Equitas Claims Unit

- 2.36 ECU,²⁸⁵ responsible for handling all manner of inward claims,²⁸⁶ is an evolution of and current²⁸⁷ successor to the Lloyd's enterprise's Specialist Claims Unit.²⁸⁸ The former's five main functions were described in *SOD*: (a) determining coverage and adjusting and settling claims; (b) instructing and managing experts such as lawyers and loss adjusters;²⁸⁹ (c) establishing appropriate reserves; (d) conducting litigation or arbitrations; (e) instructing and managing contractors.²⁹⁰ ECU's "key staff" have "extensive knowledge of non-APH claims adjusting".²⁹¹ Special considerations apply to small claims.²⁹² Its resources are presumably equal to the weight²⁹³ and size²⁹⁴ of claims.

283 And see incidentally Equitas Holdings RA fpe September 4, 1996, p.8 (Chief Executive Officer's Review). "Some APH claims may not be presented for 40 or more years": *ibid*.

284 Equitas Claims Unit: Claims Handling Guidelines (undated), §2.3.

285 See historically for example Market Bulletin Y0135, January 30, 1996 ("Establishment of Equitas Claims Unit and run-off administration").

286 Equitas Holdings RA fpe September 4, 1996, p.6 (Chief Executive Officer's Review).

287 RRC 4 suspends the relevant Deed of Authority: see RRC 4, §13 ("Suspension of Deed of Authority").

288 Set up in 1994 to adjust APH claims on behalf of managing agencies. See for example RRC 2, §6. *Ibid.*, §6.1 gave authority to Equitas Claims Unit:-

as delegate of the Managing Agent as may be necessary or expedient to permit Equitas to handle, adjust, process, settle, pay, commute, compromise, repudiate or litigate, APH Claims. Without prejudice to the generality of the foregoing, the authority to be delegated hereby will include the power on behalf of the Names and on behalf of underwriting members on any earlier year of account reinsured directly or indirectly by the Names to commence, defend, conduct, pursue, prosecute, settle or compromise legal proceedings, arbitration or any binding alternative dispute resolution procedure in any jurisdiction.

And see for example the then Chairman of Lloyd's March 2, 1995 letter ref X690 (3017). *Ibid.*, p.1:-

The Specialist Claims Unit (SCU) was created to adjust agree and settle all asbestos, onshore pollution and health hazard claims on behalf of all Lloyd's syndicates. The Unit has been in operation for a year and has 36 claims handlers including two attorneys. The SCU now has the necessary expertise, either full-time within the SCU or from part-time secondees, to fulfil its planned role. The major matter still outstanding is to transfer authority to the SCU from all syndicates involved in these claims. The SCU has initially been pursuing this authority with major Lead syndicates. It now has signed Deeds of Authority from the major Lead syndicates involved in these claims including Janson Green, SUM, Sturge, Murray Lawrence, Merrett/Pulbrook, Cuthbert Heath, R A Edwards, Wellington and Cater Allen. This means that altogether the SCU has authority signed on behalf of 700 "syndicate lives", which is over half the number involved in these claims. The Market Board has considered the matter and now believes it is appropriate to approach all remaining managing agents and ask them to sign a common form of agreement.

Before being disbanded into ECU, SCU was also handling some non-APH claims.

289 See incidentally for example FSA Guidance P2, § B7: "Suitable systems and procedures should be in place to accommodate the use of suitable experts such as loss adjusters, lawyers, accountants, etc as and when appropriate." See similarly DTI Prudential Guidance 1996, §B7.

290 *SOD*, p.85:-

The ECU will perform five main functions: making coverage determinations and adjusting and settling claims; instructing and managing experts such as lawyers and loss adjusters; establishing appropriate case reserves; conducting litigation or arbitrations; and instructing and managing contractors. It will handle direct claims and inwards reinsurance claims and operate through a combination of in-house adjusting and sub-contracting. ... In respect of non-APH claims, the ECU will adjust in-house all important claims (mainly US liability) and sub-contract the adjusting of all other claims (particularly short-tail and specialist claims). ... Equitas will sub-contract the handling of 1992 and prior claims relating to certain ongoing accounts (except APH claims) to current leaders, thereby utilising the claims expertise available in the London market. The ECU will provide guidelines to contractors for the adjusting, reserving and reporting of claims. All sub-contracted claims adjusting will be monitored by the ECU which will take control of claims, where necessary. As non-APH claims will reduce in number over time, it is envisaged that all claims handling will ultimately be undertaken by Equitas.

291 See for example *SOD*, p.85 ("An Equitas Claims Unit (ECU) has been established ... Its key staff have extensive knowledge of non-APH claims adjusting").

292 *Insurance Day*, March 26, 1998, p.6 ("Equitas focuses on the larger issues"), article by Equitas Ltd.'s CEO. *Ibid.*: "We process too many small items, the value of which does not justify their expense. ... The system is clogged with low value

third-party service providers

- 2.37 As the EquitasRe-reinsured SYA participant's RRC 4, §9 run-off agent, Equitas Re subcontracted all of its run-off agency functions *ab initio* to Equitas Ltd.,²⁹⁵ which then began by subcontracting its run-off functions to managing agencies²⁹⁶ — often, of necessity, the same managing agencies responsible for the SYAs before EquitasRe-RTC — and using some Corporation services.²⁹⁷ In the initial phase of Equitas Re's run-off-agency operation, it was assisted (on the terms of RRC 6²⁹⁸ etc.) by around 70 third parties,²⁹⁹ to whom it provided claims reserving, reporting and adjusting guidelines.³⁰⁰ Having greatly reduced³⁰¹ the number, it now performs most or all run-off functions itself, as envisaged.³⁰² Equitas Re is understood to use a small number of

items[.]” There is apparently a special scheme, SEQUALS, for items under US\$500: Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal* 1998, p.62, 65.

- 293 See generally FSA Guidance P2, §12: “Resources allocated to the claims handling function should be appropriate, both in quality and quantity, for ensuring that the systems and controls are effective at all times.”

- 294 On “large” claims, see incidentally for example FSA Guidance P2, § B8: “There should be suitable systems and procedures in place to identify and deal with any large claims, including systems to ensure that senior management are involved in the processing of large claims from the outset.”; DTI Prudential Guidance 1996, §B8: ‘There should be suitable systems and procedures in place to identify and deal with any “large” claims, thereby allowing Management to be involved in the processing of the “large” claim from the outset.’

- 295 See generally RRC 4, §9.3.

- 296 Equitas Holdings RA fpe September 4, 1996, p.6 (Chief Executive Officer's Review). *Ibid.*, p.6-7:-

Service agreements have been negotiated with 69 Lloyd's managing agents and other run-off contractors in the London market to ensure that the Group has the capacity to handle its business and to ensure continuity of service to policyholders and reinsurers. ... These contracting arrangements take advantage of the skills available in the London market and take account of the relatively rapid run down of liabilities expected in our first few years... All our contractors operate under the control of and within authorities delegated [by] the Group. All contractors are required to follow guidelines and controls that set out standards of efficiency and performance. Equitas monitors contractor performance using a variety of methods, including on-site reviews and audits.

- 297 See *SOD*, p.97:-

Equitas will continue to use certain services provided by Lloyd's to the ongoing market. These will include the claims adjusting and claims advising facilities of the LCO, the settlement advice and policy signing facilities of the Lloyd's Policy Signing Office and the central accounting settlement services of Market Financial Services. Equitas currently has office facilities in premises leased by Lloyd's. Equitas is assessing its longer-term office accommodation and location requirements and how these should be met.

- 298 See RRC 6, §3.1:-

Equitas [Ltd.], as sub-agent of the Substitute Agent, pursuant to the powers delegated to it by [Equitas Re] under [RRC 5], appoints the Contractor to provide, in respect of each of the [specifically scheduled] Syndicates, the Run-off Administration Services upon the terms of this Agreement from the Run-off Date to the Effective Date and the Contractor accepts such appointment.

- 299 See for example *SOD*, p.86:-

The run-off management function (Run-off Management) will have responsibility for contractor management, reinsurance recoveries and syndicate migration. ... [A]s Equitas will initially not have the resources or infrastructure to handle the run-off of all 1992 and prior business in-house, a significant proportion of the run-off administration will be contracted, pursuant to Run-off Administration Agreements (ROAAs), to some 70 third parties. These will include specialist run-off companies and Lloyd's managing agents. Run-off Management will be responsible for monitoring the performance of these contractors against pre-determined standards. Consultation with the market on the terms of the ROAA has now ended and negotiations on the provisions specific to each contractor are well advanced.

- 300 *SOD*, p.85.

- 301 See for example Equitas Holdings Ltd. RA fye March 31, 1998, p.10 (Chief Executive Officer's review):-

When Equitas began operations it had contracts with 69 service suppliers to perform ... run-off management functions. That number has been reduced to 35 as of 31 December 1997 through a process by which these functions had been ‘migrated’ from the initial contractors either to Equitas or to ‘strategic business partners’ — specialist companies committed to working to Equitas’ service quality and cost standards. ... By the end of 1998, all reinsurance administration and collection processes will be managed either directly by Equitas or by one of two specialist companies. In addition, our reinsurance ledgers are now managed by Equitas and just one outside contractor. ... Equitas also contracts with Lloyd's managing agencies and other companies for claims adjusting services. A migration process is under way with regard to these contractors, with the number reduced to 30 as of 1 September 1998, compared with 57 claims adjusting contractors when operations began in September 1996.

- 302 yellowdot.co.uk/interact/frnptge.htm, July 4, 2001, p.2 (but the page does not appear to be up to date; “Interact is published by the [Corporation's] insurance services business unit”: *ibid.*, p.2):-

Insurance services and Equitas are working to develop a new service agreement for 2000 and beyond, with a reduced range of services being supplied on a commercial basis. Equitas have made significant progress in simplifying and streamlining their systems and will in future not require all of the Lloyd's processing services they currently use. In addition, they are aiming to

third-party run-off agencies (apparently not at all in collecting outward reinsurance³⁰³), and to intend to use none at all in due course: Equitas run-off management staff handle contractor management³⁰⁴ and “syndicate migration”.³⁰⁵ The company appears to be required to maintain “adequate supervision” of each contractor.³⁰⁶ Equitas Re retains third parties in relation to information technology and records management.³⁰⁷

remitting claims moneys **generally**

- 2.38 Equitas Re apparently remits money weekly, apparently sometimes to the Lloyd’s broker’s IBA via Xchanging, sometimes direct to the EquitasRe-assured-at-Lloyd’s. Equitas Re having decided to pay the claim in the first place, prompt payment is apparently the rule.³⁰⁸ As to which week, apparently periods of thirty to forty-five days are not untypical. RRC 4, §3 requires Equitas Re to direct claims payment: (1) in accordance with the EATD in the case of payments made from the EATF;³⁰⁹ (2) in accordance with the ECTD in the case of payments made from the ECTF;³¹⁰ (3) in accordance with the relevant Overseas Deposit Deed in the case of payments made from any Overseas Deposit Fund;³¹¹ (4) in the case of payments in respect of the motor and or employer’s liability business of certain specified syndicates,³¹² direct to the relevant SYA par-

reduce their reliance on third party suppliers. Insurance services have been invited to tender for a range of future services, including claims adjusting, settlement services, LORS and IT services via the Lloyd’s insurance network (LIN).

“LORS” means “Lloyd’s Outward Reinsurance Scheme”. *Insurance Day*, March 26, 1998, p.6 (“Equitas focuses on the larger issues”), article by Equitas Ltd.’s CEO (“Within six months ... we expect all of our syndicates will be managed by either Equitas itself or one of two run-off specialists supporting us”). On run-off functions being performed by a small number of specialist companies, see Equitas Holdings RA fpe September 4, 1996, p.7 (Chief Executive Officer’s Review; “Simplifying contractual relationships will make the Group’s operations more manageable over time and will facilitate the integration and simplification of business process and information systems within Equitas”).

303 See p.88.

304 *SOD*, p.86. *SOD* indicated that, initially, a significant proportion of the run-off administration would be subcontracted (using Run-off Administration Agreements, *viz.*, forms of RRC 6) to around seventy subcontractors including specialist run-off companies and managing agencies. *SOD*, p.86.

305 *SOD*, p.86. “Syndicate migration” means the process of allocating SYA run-off to either Equitas in-house or a “few” external run-off companies: *ibid.*

306 DTI Prudential Guidance 1996, §2.6: “The company should maintain adequate supervision and control over any external resources used to assist the claims handling function.” And see FSA Guidance P2, §15: “The insurer should maintain adequate supervision and control over any external resources used to assist the claims handling function.” *Ibid.*, §14. If external resources are used, managers should take such steps as are reasonable and appropriate to satisfy themselves that the resource is of the appropriate quality, experience and competence.”

307 Equitas Holdings RA fye March 31, 2002, p.10 (Chief Executive Officer’s review):-

The average number of employees decreased to 660 in the year ended 31 March 2002 (2001: 739). This reduction in headcount takes into account the full effect of our decision to outsource information technology, facilities management and records management functions in the year ended 31 March 2001, although that reduction was somewhat offset by an increase in the number of reinsurance recovery employees due to the consolidation of this function in-house on 1 April 2001.

308 Equitas Claims Unit: Claims Handling Guidelines (undated), §3.1 (“A valid claim under a specific policy will be accepted and paid promptly”). And see *ibid.*, §4.6 (“We should arrange for payment of our syndicates’ several shares of a claim promptly after it has been accepted.”). And see *ibid.*, §4.1 (“Generally, subject to the time constraints set forth in section 2 above and in applicable U.S. state statutes and regulations upon analysing a claim and the relevant documentation we may, among other responses: (a) accept and arrange for payment promptly of our syndicates’ several shares of the claim in whole or in part”). And see Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal* 1998, p.62, 64:-

When we are presented with a claim which we believe is covered our policy is to adjust and pay as promptly as we can. Furthermore, even when we receive claims where coverage is in doubt our desire is still to achieve a solution as quickly as possible. In those rare instances where no compromise is warranted we choose to litigate but in most cases we would prefer to negotiate a compromise with adversaries who are like-minded.

This presupposes Equitas Re’s agreement to pay in the first place. See incidentally Equitas Holdings RA fye March 31, 2001, p.13 (Financial review): “Claims are expected to be settled later than previously assumed, so that we will be able to earn a higher investment return”.

309 RRC 4, §3.4(a).

310 RRC 4, §3.4(b).

311 RRC 4, §3.4(c).

312 *Viz.*, the thirty-nine syndicates listed at RRC 4, Sch 6.

participant's PTF;³¹³ (5) in any other case, direct to the policyholder or "such other person as is entitled thereto".³¹⁴ Where there has been a RRC 7 "Insolvency Event" in relation to *ibid.*, §3.4(d) or (e),³¹⁵ Equitas Re must make the payment direct to the Equitas Policyholders Trustee Limited if the latter so requires.³¹⁶ No EquitasRe-reinsured SYA participant is entitled to claim payment direct from Equitas Re of any amount payable by Equitas Re under RRC 4, §3, such as (for example) claims moneys and return premium.³¹⁷

whose money?

- 2.39** Unlike a managing agency conventionally at Lloyd's, Equitas Re does not have, manage or control any individual EquitasRe-reinsured SYA participant's relevant personal-use funds. RRC 4's implementation has endowed Equitas Re with its own beneficially owned funds. Each EquitasRe-reinsured SYA participant irrevocably gave, rather than banked, Equitas premium to, rather than with, Equitas Re irrevocably with no prospect of recovery other than under the circumstances set out at RRC 4, Sch. 5. Somewhat paradoxically, Equitas Re as RRC 4, §9 run-off agent thus holds each EquitasRe-reinsured SYA participant's Equitas premium for the sole purpose of meeting his relevant liabilities but as its own personal funds in one agglomerated account: see RRC 4, §15.3. Equitas Re disburses that money to EquitasRe-assureds-at-Lloyd's as both RRC 4, §3 reinsurer principal and *ibid.*, §9 agent.

CLAIMS DISPUTES

orientation

- 2.40** Equitas Re's apparent approach to claims disputes is to prefer negotiation to litigation but it will litigate if appropriate.³¹⁸

suing EquitasRe-reinsured SYA participants

- 2.41** Nothing about RRC 4, including the precise nature (reinsurance, insurance, RTC, etc.) of the *ibid.*, §3 product, prevents the EquitasRe-assured-at-Lloyd's from suing relevant EquitasRe-reinsured SYA participants in the ordinary way; the policy boilerplate service-of-suit clause³¹⁹

³¹³ RRC 4, §3.4(d).

³¹⁴ RRC 4, §3.4(e). And see *SOD*, p.85.

³¹⁵ RRC 4, §3.4(d) deals with payments in respect of motor and or employer's liability business of syndicates specified in RRC 4, Sch 6. §3.4(e) requires Equitas Re to make payment in cases not covered by *ibid.*, §3.4(a)-(d) direct to the "Insurance Creditors" of the relevant SYA [stamp] "or such other person as is entitled thereto".

³¹⁶ RRC 4, §3.4, first sentence, if Equitas Policyholders Trustee in its absolute discretion makes an election under RRC 4, §4.10. Any such payment counts as discharge of the relevant Reinsurance Obligation: *ibid.*

³¹⁷ RRC 4, §9.4(c); *q.v.* for detailed provisions.

³¹⁸ See for example Equitas Holdings RA fye March 31, 1998, p.7-8 (Chief Executive Officer's review):-

The Group's 'fair but firm' claims management policy remains unchanged. Equitas will pay valid claims promptly, both to fulfil policy obligations and to reduce unnecessary costs. Invalid claims are resisted by all means at our disposal. ... We place great emphasis on negotiation, rather than litigation, and we attempt to discuss issues directly with policyholders whenever feasible. ... More than 95 per cent of the claims paid by Equitas have been settled through negotiation rather than court judgments. On the other hand, we will vigorously litigate where necessary to defend our position, either with reference to a specific claim or to establish a more general point of law.

³¹⁹ There is a very extensive US jurisprudence on the service-of-suit clause (considered in detail at *Astor's Law of Lloyd's*, 2nd Ed.) Typical wording:-

Service of Suit. It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request if the Insured, will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States. It is further agreed that service of process in such suit may be made upon the firm or person named in item 6 of the Declaration Page, and that in any suit instituted against any one of them upon this contract. Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal. The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Insured to give a written undertaking to the Insured that they will enter a general appearance upon Underwriters' behalf in

operates in the ordinary way. The EquitasRe-assured-at-Lloyd's sues the relevant EquitasRe-reinsured SYA participant through Equitas Re as RRC 4, §9 run-off agent: as ordinarily at Lloyd's, no EquitasRe-reinsured SYA participant has any control of the conduct of any coverage dispute over any of his own insurance contracts. Equitas Re also defends coverage claims on its own behalf as *ibid.*, §3 reinsurer. The obligation to pay a litigation judgment or arbitration award made against relevant EquitasRe-reinsured SYA participants initially falls, as a practical matter, on Equitas Re personally, or relevant funds under its control.³²⁰ Equitas Re has no replenishable EquitasRe-reinsured SYA participant's personal-use funds as such³²¹ under its management or control or at its disposal, no sure means of replenishing its own personal funds, and no established Central Fund personal-use float procedure.³²² If Equitas Re then defaults, the EquitasRe-assured's-at-Lloyd's recourse is not against any EquitasRe-reinsured SYA participant or Equitas Re personally but against relevant common-use and relevant other claims payment securitisation funds at Lloyd's.

suing Equitas Re personally beyond the scope; generally

- 2.42 A discussion of the extensive US federal and state jurisprudence concerning personal jurisdiction³²³ over Equitas Re, and the company's personal liability under RRC 4, §3 direct to an EquitasRe-assured-at-Lloyd's, is outside the scope of this English law edition. If the claim is valid in the first place, query the leverage in suing Equitas Re in a jurisdiction where such an initiative has already proved problematic,³²⁴ or where it is already accepted³²⁵ (the action may succeed and jeopardise the claimant's recourse to relevant funds at the Lloyd's enterprise). Since all books and records in Equitas Re's hands will (generally) necessarily derive directly (though not neces-

the event such a suit shall be instituted. Further, pursuant to any statute of any state, territory, or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Insured or any beneficiary hereunder arising out of this contract of insurance, and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

³²⁰ See generally RRC 4, §3.4.

³²¹ See p.82.

³²² That is not to exclude the possibility that the Council may decide in the future to disburse Central Fund moneys as a personal-use float for Equitas Re in the hope of eventual reimbursement by the latter.

³²³ For examples of Equitas Re submitting to the jurisdiction of English courts, see the annotation to RRC 4, §25.1.

³²⁴ See for example *Truck Insurance Exchange v Equitas Limited et al.*, No. BC 260738 (Ca. Sup. June 4, 2002); *Brown-Ferris Indus., Inc. v Certain Underwriters at Lloyd's London*, No. 98-56362-A and No. 98-56362 (80th Dist. Harris Cty., Tex. Nov. 8, 2001); *ZRZ Realty Co. v Certain Underwriters at Lloyd's of London*, No. 0007-07403 (Or. Cir. Ct., Multnomah Cty. Apr. 23, 2001); *Employers Ins. of Wausau v Tektronix, Inc.*, No. CCV 9908-032 (Or. Cir. Ct., Clackamas Cty. Jan 18, 2001); *Malone v Equitas Reinsurance Ltd.*, 101 Cal. Rptr. 2d 524 (Ct. App. Cal. 2000); *Peco Energy Co. v Ins. Co. of N. Am.*, No. 99-07386 (Pa. Ct. Common Pleas, Chester Cty. Aug 17, 2001); *Boeing Co. v Underwriters At Lloyd's*, No. 99-03873-8 SEA (Wash. Sup. Ct., King Cty. Dec 21, 1999); *B.F. Goodrich Co. Commercial Union Ins. Co.*, No. CV 99 02 0410 (Ohio Ct. Common Pleas, Summit Cty. Oct. 14, 1999); *Archdiocese of Milwaukee v Certain Underwriters At Lloyd's London*, No. 96-CV-006626 (Wis. Cir. Ct., Milwaukee Cty. July 13, 1999); *Union Pac. R.R. v Equitas Ltd.*, 987 P 2d 954 (Colo. Ct. App. 1999); *Idaho Power Co. v Underwriters at Lloyd's*, London, No. 97-0203-S-BLW (D. Idaho Mar. 31, 1999); *Millennium Petrochemicals, Inc. v C.G. Jago*, 50 F. Supp. 2d 654 (W.D. Ky. 1999); *USX Corp. v Adriatic Ins. Co.*, 64 F. Supp. 2d 469 (W.D. Pa. 1998); *Long Island Lighting Co. v Aetna Cas. & Sur. Co.*, No. 96 Civ. 9664 (MBM), 1997 WL 567342 (S.D.N.Y. Sept. 11, 1997); *First State Ins. Co. v Minn. Mining & Mfg. Co.*, No. C3-94-12780 (Minn. Dist. Ct., Ramsey Cty. May 1, 1997).

³²⁵ See for example *Equitas Reinsurance Ltd. v Brown-Ferris Indus.*, No. 14-99-01084-CV (Ct. App. Houston Apr. 26, 2001); *GAF Corp. v Hartford Accident & Indem. Co.*, No. L-980-97 (N.J. Super. Ct., Somerset Cty. Mar 31, 2000); *Central Maine Power Co. v Moore*, No. CV-93-489 (Me. Super. Ct., Kennebec Cty. Jan. 10, 2000; and see *ibid.*, May 16, 1999); *Uniroyal v Am. Re-Insurance*, No. Som-L-8172-94 (N.J. Super. Ct., Middlesex Cty. Dec. 17, 1999); *Unisys v Ins. Co. of N. Am.*, No. L-1434-94S (N.J. Super. Ct., Middlesex Cty. Dec 17, 1999); *Employers Mut. Cas. Co. v Owens Ins., Ltd.*, No. MRS-C-51-96 (N.J. Super. Ct., Morris Cty. Nov. 10, 1999); *Central Vermont Pub. Serv. Corp. v Adriatic Ins. Co.*, No. I:96-CV-252 (D. Vt. Feb. 11, 1998); *Employers Ins. of Wausau v Certain London Market Companies*, 1997 WL 1134980 (W.D. Wis.). And see *Inspiration Consolidated Copper Co. v American Ins. Co.* (Ariz. Super. Ct., Maricopa Cty., April 25, 2001) and *E. I. DuPont de Nemours & Co. v Allstate Ins. Co.* (Del. Sup. Ct., New Castle Co., March 29, 2001).

sarily exclusively) from its RRC 4, §9 run-off agency role, presumably no further books or records will be forthcoming by suing Equitas Re in its *ibid.*, §9 run-off agency capacity.

assumption reinsurance

2.43 In suing Equitas Re on an assumption reinsurance theory, care should be taken to avoid:-

(1) misunderstanding of recourse. Usually the point of deploying an assumption reinsurance theory is to seize a solvent reinsurer with the liabilities of a less financially endowed reinsured. In relation to a particular EquitasRe-reinsured liability, the position appears to be reversed. The EquitasRe-assured-at-Lloyd's in practice has no meaningful recourse to any EquitasRe-reinsured SYA participant — the notion is absurd³²⁶ — but has³²⁷ or can argue³²⁸ extensive recourse to relevant common-use funds at the Lloyd's enterprise. Not only does meaningful recourse already exist, but a successful assumption reinsurance argument against Equitas Re may put that recourse in jeopardy³²⁹ to no apparent financial advantage;

(2) misunderstanding of Equitas Re's RRC 4, §9 run-off agency role. Equitas Re's RRC 4, §9 functions, however comprehensive, are mere run-off agency functions characteristic of managing agencies ordinarily at Lloyd's,³³⁰ and do not of themselves make the company an assumption reinsurer. It is in its RRC 4, §3 capacity (which inherently happens to include claims handling), if at all, that Equitas Re is an assumption reinsurer.

damages for actionable claims handling

2.44 Some³³¹ common-use fund governing instruments expressly prevent the fund's use to pay punitive damages. Equitas Re is obliged³³² to indemnify the EquitasRe-reinsured SYA participant for punitive and penal damages as *ibid.*, §3 reinsurer; *ditto* as *ibid.*, §9 run-off agent.³³³ Under either provision, Equitas Re can be seised with personal liability for a punitive damages component irrecoverable from a relevant common-use fund, at the suit of Equitas Policyholders Trustee³³⁴ and arguably at that of the relevant EquitasRe-assured-at-Lloyd's. RRC 4, §3.2 invites — and RRC 4 contains none of the conventional “pay now, sue later” managing agency agreement provisions enabling Equitas Re to conceal — the distinction in a particular insurance transaction between ordinary insurance indemnity and punitive and penal damages,³³⁵ including for actionable claims handling (ordinarily at Lloyd's the managing agency's actionable claims handling passes unnoticed both administratively³³⁶ and functionally³³⁷).

³²⁶ See p.165.

³²⁷ See Chapter 3, Sub-chapter 1.

³²⁸ See Chapter 3, Sub-chapter 2.

³²⁹ See pp.84, 86.

³³⁰ See SUA 1 / SCA 1; SMA 1; SMA 2, etc.

³³¹ See for example Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §§1.3, 2.3(e); Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §§1.3, 2.3(e). LATD contains no such provisions.

³³² See RRC 4, §3.2. See similarly RRC 5, §2.3 (Equitas Ltd. similarly obliged).

³³³ See RRC 4, §10.2.

³³⁴ See for example RRC 7, §2.2.

³³⁵ See RRC 4, §3.2 (Equitas Re's liability to the EquitasRe-reinsured SYA participant for punitive reinsurance damages); RRC 5, §2.3 (Equitas Ltd.'s liability to Equitas Re for punitive retrocession damages).

³³⁶ Ordinarily at Lloyd's, the SYA-level passivity rule and a number of “cash conveyor belt” provisions ensures that a managing agency is under no duty to disclose its own personal claims handling actionable misconduct; is in practice easily able to conceal it. Self-regulators-at-Lloyd's require no disclosure of the matter by any managing agency. As a practical matter, poly-slips with small lines signed by poly-stamps — each SYA participant having a relatively inconsequential fraction of personal liability — have traditionally ensured that relevant claims handling actionable misconduct in any one insurance transaction by any one managing agency in relation to any one SYA participant goes unnoticed; (3) routinely does conceal it; and is empowered (see for example SUA 1/ SCA 1, §7.1(e) — there is a common-law fraud exception: see *Boobyer v David Holman & Co. Ltd. and Lloyd's (No.2)* [1992] 1 Lloyd's Rep. 96 (Saville J); and see *Marchant & Eliot Underwriting Ltd. v Higgins* [1996] 2 Lloyd's Rep. 31, 33 (Leggatt LJ); *Lloyd's v Clementson* {1a} [1995] LRLR 307,

recourse risks

- 2.45** In seeking — whether on an assumption reinsurance, party-in-interest, misunderstanding of RTC³³⁸ or some other theory — a judgment or an arbitration award against Equitas Re personally, the EquitasRe-assured-at-Lloyd's should take care not to jeopardise his recourse to relevant funds at the Lloyd's enterprise. For example:-

(1) available-by-express-right common-use funds at the Lloyd's enterprise: a judgment (or, where relevant, arbitral award) against Equitas Re appears not to be a judgment capable of leading to a "Matured Claim"³³⁹ necessary to access Lloyd's US Surplus-Lines Common-Use Trust Fund³⁴⁰ or (if appropriate) or Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund³⁴¹. To the extent that he does obtain a relevant decision against Equitas Re personally, it may be useless for the purpose of accessing those trust funds. If Equitas Re then defaults materially on the judgment and the claimant having then realised his position, he may be estopped or otherwise prevented from re-litigating the same issue against the correct conduit-defendants;

(2) available-by-argument common-use funds. the more the EquitasRe-assured-at-Lloyd's seeks to exonerate the Lloyd's enterprise by pursuing Equitas Re personally (for which there would generally be no compelling reason), the more he would appear necessarily to risk disturbing the ordinary rule³⁴² that every insurance liability incurred at Lloyd's is payable 100% at Lloyd's.

**settlement
orientation**

- 2.46** The possibility of Equitas Re disputing a claim's validity and (while solvent) offering materially less than 100% is (as a general matter) anecdotally said to be higher than at managing agencies ordinarily at Lloyd's. Presumably well before settling³⁴³ at Equitas Re at materially less than 100% — Equitas Re aspires to settle at 37%³⁴⁴ — the EquitasRe-assured-at-Lloyd's will wish, as

308 *et seq.* (Saville J); *Arbuthnott v Fagan* [1996] LRLR 135, 138 (Bingham MR), 141 (Hoffmann LJ)) to seise every SYA participant with financial responsibility for it. It is for each relevant individual SYA participant, if he ever discovers it, not to attempt to sever the claims handling liability from the pure insurance liability and put the assured-at-Lloyd's to the trouble of suing the managing agency separately, but to "pay now" (see for example *Marchant & Eliot Underwriting Ltd. v Higgins* [1996] 2 Lloyd's Rep. 31 (CA; upholding SMA 2's PNSL clause) on appeal from [1996] 1 Lloyd's Rep. 313 (Rix J); *Boobyer v David Holman & Co. Ltd. and Lloyd's (No.2)* [1992] 1 Lloyd's Rep. 96 (Saville J; upholding SMA 1's PNSL clause)), "sue later". Substantive actions include (for example) *Deeny v Gooda Walker Ltd.* {3} [1996] LRLR 183 (Phillips J); *Arbuthnott v Feltrim Underwriting Agencies Ltd.* [1995] CLC 437 (Phillips J); *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd's Rep. 618 (Potter J); *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265 (Cresswell J); *Berriman v Rose Thomson Young (Underwriting) Ltd.* [1996] LRLR 426 (Morrison J); and *Wynniatt-Husey v R.J. Bromley (Underwriting Agencies) Plc* [1996] LRLR 310 (Langley J).

337 The managing agency is not personally a reinsurer.

338 As apparently argued, and rejected, in *Long Island Lighting Co. v Aetna Cas. & Sur. Co.*, No. 96-9664(MBM), 1997 WL 567342 (S.D.N.Y. Sept. 11, 1997; at *ibid.*, *3: "Equitas, by virtue of having 'reinsured to close' several pre-1993 liability insurance policies, now qualifies as the 'real party in controversy' ... [and] that as a result of this reinsurance [to close], Equitas — not the Names — bears the burden of making payment on these policies").

339 See p.111.

340 See p.109 and Appendix 2.3.

341 See p.114 and Appendix 2.4.

342 See Chapter 3.

343 See for example Scott Moser, Equitas Claims, Address to the Insurance Institute of London, January 14, 1999 ("Equitas is firmly committed to negotiation, rather than litigation, when settling claims"). See similarly Mealey's Seminar Friday 16th November 2001 — Presentation By Scott Moser Equitas Claims Director at *Mealey's Litigation Report: Insurance*, December 11, 2001, p.27, 28:-

In virtually all cases we would prefer to negotiate a compromise with policyholders. And we usually do so. Of the vast amount of money that we have paid out, less than 5% was paid out as a result of court judgments or arbitration decisions. The rest we have paid as a result of agreements with policyholders. ... Our commitment to settling claims includes membership in the Center for Public Resources, the world's leading ADR organization. We've also retained Lehman Brothers to help develop creative financial solutions to enhance the value to policyholders of settlement payments from us.

344 Scott Moser, *Equitas Claims*, Address to the Insurance Institute of London, January 14, 1999:-

elementary due diligence, to ascertain precisely and exhaustively which personal-use, common-use and other claims payment securitisation funds at the Lloyd's enterprise are available — by express right and by argument — to pay his claim; what percentage recourse each fund affords; how long each will take to access; how much that access will cost; how his recourse prospects at Lloyd's compare in amount, time and net cost to his ascertained recovery from Equitas Re; and the extent to which such intelligence leverages his settlement discussions with Equitas Re (which company appears to apply an initial discount for the EquitasRe-assured's-at-Lloyd's failure to perform such due diligence).

contents of the settlement agreement

- 2.47 To the extent that he wishes to do so in the first place, the EquitasRe-assured-at-Lloyd's is free to settle at Equitas Re for less than 100% of his claim. He settles by contracting with each relevant EquitasRe-reinsured SYA participant through the compulsory mediation of the latter's RRC 4, §9³⁴⁵ run-off agent, Equitas Re. The typical formal entire-agreement, without-prejudice, standard-form (but, anecdotally, highly negotiable) draft settlement agreement proffered by Equitas Re on behalf of relevant EquitasRe-reinsured SYA participants³⁴⁶ and itself as third-party beneficiary³⁴⁷ is believed to include (for example): (1) acknowledgment that co-insurers insure, and pay settlement monies, severally³⁴⁸ and not jointly; (2) severalised payment by participating insurers to the EquitasRe-assured-at-Lloyd's by a stipulated deadline; (3) comprehensive³⁴⁹ releases and discharges, and his waiver of relevant legal rights, by the EquitasRe-assured-at-Lloyd's in the widest sense, in relation to all known and unknown, past present and future rele-

One of the thing you learn in kindergarten is to share. ... What happens if we just share? ... We would need to pay \$36.84 on the first day to produce the equivalent of \$100 after ten years, but neither of us would incur any legal costs. The result is a claimant that receives \$36.84 instead of \$17.19, and an Equitas that pays \$36.84 instead of \$66.08. ... Even if the claimant would have won \$175 at Year 10 — 75% more — the net present value of that sum on Day 1 is only \$35.73, still less than the \$36.84 in my sample compromise. And even if we would only have had to pay \$50 in Year 10, only half of the \$100 we thought, the cost to us as of Day 1 would have been \$38.96, still more than the cost of my sample Day 1 compromise. Thus, for both sides, any risk that the value we arrive at early may be wrong is far more than offset by a deal in which the parties share the benefits of settling early.

And see Mealey's Seminar Friday 16th November 2001 — Presentation By Scott Moser Equitas Claims Director at *Mealey's Litigation Report: Insurance*, December 11, 2001, p.27, 28:-

We make clear, on the public record, that money on our balance sheet is worth only the long term bond rate to us — generally between 5%-6%. That is the maximum rate at which our funds grow while you fight with us for more. Many policyholders have realized they can do far better than that with our money. I continue to urge those who have not settled with us to look again at what we are offering and what they can do with this money and to reconsider whether making a deal is economically better — for both of us, than continuing to litigate.

Offering materially less than 100% tends to confirm that Equitas Re has nothing whatever to do with the EquitasRe-assured's-at-Lloyd's real insurer.

- 345 Equitas Re's power and authority to settle on behalf of each EquitasRe-reinsured SYA participant is at RRC 4, §9.2(a) (claims) and *ibid.*, (d) (litigation).

- 346 The phrase "Names, underwriters and syndicates" apparently in Equitas Re's standard-form settlement agreement is highly infelicitous. For example: (1) syndicates do not trade, do not sell insurance, and are incapable of being a party to anything including a settlement agreement; (2) Names (as the word is colloquially used) are by definition underwriters: "Names [and] underwriters is tautologous; (3) if "underwriters" is supposed mean "active underwriters", Byelaw 4 of 1984, §23 (where managing agency is a company), *ibid.*, §32 (general partnership), and *ibid.*, §34(a) (limited partnership) requiring the active underwriter to participate on the SYA for whose participants he actively underwrote was repealed by Byelaw 14 of 1998.

- 347 Typical wording is understood to be on the lines of: "This Release also extends to Equitas Reinsurance Limited and Equitas Limited. Both of these entities are third-party beneficiaries of the terms of this Release"; "This indemnification and hold harmless undertaking (paragraphs A, B and C immediately above) shall also extend to the benefit of Equitas Reinsurance Limited and Equitas Limited. Both of these entities are third-party beneficiaries of this indemnification and hold harmless undertaking".

- 348 And see, in the case of each SYA participant, Lloyd's Act 1982, s.8(1). Cf. the Member's General Undertaking liability to make (coincidentally, severalised) contributions to common-use claims payment securitisation funds: see for example p.133 (Members' contributions to the New Central Fund).

- 349 Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal* 1998, p.62, 67:-

When we settle disputed claims and when we make a deal, we need finality and would rather buy back the policy than be liable for more claims. We therefore insist on very broad releases from future liability and on being indemnified against further claims on the same matters by others. Once we settle a disputed matter we do not want to see further related claims.

vant claims (including in relation to damages, costs and expenses) and relevant insurers. Known claims will typically be listed in an attachment. This component of the settlement may have the effect of precluding the settling EquitasRe-assured's-at-Lloyd's recourse to any relevant component of the Lloyd's enterprise; (4) his obtaining all appropriate dispute-resolution dismissals with prejudice; (5) express inclusion where appropriate of Equitas Re as a third-party beneficiary; (6) the agreement to be without prejudice to the parties' positions on policy wordings or other relevant issues. The standard-form draft settlement agreement does not appear to seek to novate any underlying insurance contract away from the liable EquitasRe-reinsured SYA participant to Equitas Re.

recourse implications of settling

2.48 A settlement made with relevant EquitasRe-reinsured SYA participants does not of itself, in principle, extricate from the Lloyd's enterprise the settlement debt as quantified in the settlement or novate or otherwise transfer (*cf.* obtaining an adjudication that Equitas Re is an assumption reinsurer) the relevant EquitasRe-reinsured SYA participants' liability to Equitas Re. Recourse to the Lloyd's enterprise is in principle prejudiced by quantifying relevant insurance liability contractually no more than judicially or arbitrarily. But:-

(1) recourse effect of no judgment or award: some common-use funds can be accessed by the assured-at-Lloyd's only via a judgment or arbitration award. Settlement before final judgment or arbitral award within §2.3 of either Lloyd's US Surplus-Lines Common-Use Trust Fund or Lloyd's US Credit-for-Reinsurance Trust Fund will likely preclude the "Matured Claim" necessary to access assets in either fund. Similarly under LATD, §5.2;

(2) recourse effect of releases or novation: in settling, the EquitasRe-assured-at-Lloyd's will wish to ensure that he does not enter into any releases which (since the EquitasRe-reinsured SYA participant is merely a conduit) unwittingly deprive him of relevant recourse to relevant common-use funds at Lloyd's, either by releasing EquitasRe-reinsured SYA participants to any unintended extent, or by entering into a novation of the underlying insurance contract to a potentially impecunious Equitas Re.

treating with Equitas Re may adversely
affect recourse

fund	assumption / settlement may affect availability	how availability affected	assumption reinsurer / settlement bottom line
New Central Fund	possibly if the EquitasRe-assured-at-Lloyd's expressly releases the EquitasRe-reinsured SYA participant	release arguably not wholly fatal to recourse: the Council has various discretions and or obligations	the EquitasRe-assured-at-Lloyd's would presumably wish to preserve recourse if Equitas Re defaults
Old Central Fund			
Corporation's personal assets			
LATF	to the extent that the settlement prevents the EquitasRe-assured-at-Lloyd's from obtaining or proceeding with a qualifying final judgment or arbitral award	no recourse if no LATD, §5.2 claim	
Lloyd's US Surplus-Lines Common-Use Trust Fund	Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund	no access to either fund if no §2.3 "Matured Claim"	
relevant EquitasRe-reinsured SYA participant's personal assets			
completely irrelevant to payment of settlement monies; to recourse in default of payment of settlement monies; and generally			

OUTWARD REINSURANCE

Equitas Re appears to have sold to each EquitasRe-reinsured SYA participant RRC 4, §3 outward reinsurance subject to, rather in duplication of, pre-existing outward reinsurance — of which overall there was a considerable quantity, including that sold by EquitasRe-reinsured SYA participants to each other.³⁵⁰ The overall position is complex.³⁵¹ The EquitasRe-reinsured SYA participant assigned in RRC 4³⁵² to Equitas Re as *ibid.*, §3 reinsurer principal, all his rights in all relevant outward reinsurance recoveries — hundreds of thousands of separate contracts³⁵³ — and in reduction, to the extent actually recovered,³⁵⁴ of Equitas Re's own personal *ibid.* liability to the EquitasRe-reinsured SYA participant. Equitas Re then assigned those rights to Equitas Ltd.³⁵⁵ Equitas Ltd. has worked closely with external outward reinsurers.³⁵⁶ It makes claims³⁵⁷ on external outward reinsurance — as RRC 5, §3.2 assignee, not (only) as mere *ibid.*, §5 run-off sub-

³⁵⁰ In respect of such insurance, there appears not to be even a detailed record. See for example, contemporaneously, Market Bulletin X696, February 27, 1995 (“Equitas data gathering — reinsurance”):-

Equitas has already collected a great deal of information about syndicates’ reinsurance policies for the 1985 and prior years. However, there are some data which Equitas will require in order to carry out the reserving process which managing agents have indicated they are not able to provide directly. As part of the process of setting the premium to reinsure the 1985 and prior years, Equitas will be considering syndicates’ liabilities to reinsurance of other syndicates. In order to take account of these liabilities, Equitas needs to identify the syndicate participations for each of the reinsurance policies for which credit will be given. Many syndicates have not been able to identify this information and have indicated that they would have to contact their brokers to obtain it. Rather than have each syndicate approach their brokers individually and then pass on the [illegible] Equitas is proposing to collect the information from the brokers directly. There should be no need to issue a specific letter of authority to brokers allowing them to release the data as the authority has already been provided as part of the special agency agreement.

EquitasRe-reinsured SYA participants also sold to each other PS LI: syndicates 134, 184 and 387 are notorious examples.

³⁵¹ See for example Scott Moser, *Equitas Claims*, in the *Insurance Institute of London Journal* 1998, p.62, 65: “Our reinsurances and retrocessions are so complex that we quite literally cannot tell how any particular solution will ultimately impact Equitas.” Equitas Holdings RA fye March 31, 1998, p.8-9 (Chief Executive Officer’s review):-

In the financial year ended 31 March 1998, the Group recovered £660 million in reinsurance on paid claims, compared with £840 million in the first seven months of operations. This is in line with expectations, particularly considering that claims payments in both periods were lower than expected. The realisation of the reinsurance asset is crucial to Equitas’ success. We are generally encouraged by the positive reaction which Equitas has received from most reinsurers. On the other hand, the absence of an ongoing revenue-producing relationship often means that we must expend considerable effort to ensure that our reinsurance claims receive the right level of attention from brokers and reinsurers. ... [S]ome litigation on reinsurance issues is inevitable. ... The Group has negotiated a substantial number of commutations of syndicates’ obligations to, and recoverables from, individual reinsurers. Based on the Group’s experience to date, we intend to increase our commutation activities in the current financial year.

³⁵² See RRC 4, §§6.1 and 6.4.

³⁵³ See for example June 12, 1998 letter from Equitas Trustees to reinsured Names, p.3 (“Equitas’ initiatives to reduce the costs of collecting on the hundreds of thousands of reinsurance policies of the syndicates are of considerable importance ...”). And see *R&R* 7, p.5 (mentioning an analysis of “220,000 reinsurance contracts placed with 5,500 reinsurers to protect Lloyd’s syndicates from losses deriving from 1992 and prior liabilities”); R. Williams (Head of Security, Insolvency & Support, Equitas Ltd.), *Making A Meal of the Bones, A Creditor’s View of Run-Off & Insolvency* at Association of Run-Off Companies website (<http://www.aroc.org.uk>), July 18, 2001, p.1 of 9: “£14bn of liabilities and £15bn in assets derived from over 300 syndicates managed by over 70 separate businesses The reinsurance asset consists of over 250,000 separate reinsurance contracts placed with 3,000 reinsurers and 2,000 underwriting pools.” And see *Price and Price v Lloyd’s* [2000] Lloyd’s Rep IR 453, 457 (Colman J).

³⁵⁴ See RRC 4, §3.2(a).

³⁵⁵ See RRC 5, §3.2.

³⁵⁶ Equitas Holdings RA fpe September 4, 1996, p.8 (Chief Executive Officer’s Review). *Ibid.*, p.8-9:-

[W]e have made a concerted effort to establish effective relationships with our major reinsurers. We have involved key reinsurers in the development of policies and processes designed to ensure that potential conflicts affecting reinsurers — for example, claims running between two reinsured syndicates — are resolved fairly and transparently. In some instances, Equitas has taken over reinsurance recoverable from financially impaired companies. We are addressing this issue as a priority, and we have been aggressive in pursuing collections, often involving commutations, in these situations.

³⁵⁷ See for example *Baker v Black Sea & Baltic General Insurance Co. Ltd.* [1998] Lloyd’s Rep IR 327, 336 (Lord Lloyd). Generally, see Scott Moser, *Equitas Claims*, *Insurance Institute of London Journal* 1998, p.62, 65:-

Some reinsurers may be afraid that we will tinker with our claims settlements to maximise our reinsurance recoveries but we would not do that because it would not be right and also because it would not work over the long haul. But in case that is not enough comfort, I would offer one further reason to relax — we’re not smart enough. Our reinsurances and retrocessions are so complex that we quite literally cannot tell how any particular solution will ultimately impact Equitas.

agent — through its “Run-Off Operations” department.³⁵⁸ It has apparently not used third-party collection agents since April 1, 2001.³⁵⁹

RECORD-KEEPING

generally

- 2.49** Maintaining a document warehouse (apparently the largest in Europe and maintained at a temperature and humidity appropriate to old paper records) at Aylesford, Kent, apparently catalogued in an Excel file called “Takeover” (presumably part of Equitas Re’s “MAX” computer database), Equitas Re holds a considerable quantity of documents.³⁶⁰ Equitas Re’s run-off agency records largely comprise, and to that extent are largely only as good as, such of the relevant predecessor managing agency’s own relevant records as the latter transmitted to it (no part of R&R is believed to have committed the Corporation (including in relation to records kept by LPSO or LCO), or any Lloyd’s broker to share its own personal records with Equitas Re). Some managing agencies, under the Old Committee’s and then the Council’s self-regulation, did not keep adequate records of the products sold by them on behalf of their SYA participants.³⁶¹

accessing records

- 2.50** Equitas Claims Unit: Claims Handling Guidelines (undated) indicate Equitas Re’s authority to act for “hundreds of syndicates”; “we will access appropriate individual syndicates’ records as the need arises”.³⁶² Equitas Re is thought to have one or more functionaries dedicated to marshalling and maintaining records acquired from relevant managing agencies, including a so-called North American discovery coordinator within the Internal Technical and Facilities Management department, whose job includes responding to discovery requests against EquitasRe-reinsured SYA participants. In the event that a discovery request delivered to Equitas Re related to information in the Corporation’s control, an Equitas Re employee would, it is presently understood, approach the Corporation for that information; would generate a written record as to what documents his supervisor asked him to look for in the first place, what documents were then accessed, and what information was found. Use may also be made of Equitas Re’s under-

³⁵⁸ Equitas Holdings RA fye March 31, 1998, p.9 (Chief Executive Officer’s Review):-

[W]e have changed the criteria for issuing reinsurance collection notes. ... Under our revised approach we aggregate reinsured claims until they have reached a threshold of US\$25,000 per reinsurer before a collection note is issued. ... We ... have ceased processing reinsurance transactions on a daily basis for 150 syndicates (out of a total of 390) whose reinsurance programmes have an ultimate value of less than £10 million, but whose costs are disproportionately high. Instead, we now process losses attaching to these syndicates’ reinsurance programmes less frequently, for example biannually or annually, depending on the size of the syndicate and the type of reinsurance programme.

See similarly Equitas Holdings RA fpe September 4, 1996, p.6 (Chief Executive Officer’s Review).

³⁵⁹ Equitas Holdings RA fye March 31, 2002, p.8 (Chief Executive Officer’s review):-

We have continued to refine our traditional reinsurance collection processes over the past year, including the consolidation in-house on 1 April 2001 of all of our reinsurance processing activities that had previously been contracted to other companies. This consolidation has significantly reduced costs and greatly improved the co-ordination of traditional reinsurance collection efforts with commutations.

³⁶⁰ See for example Scott Moser, *Equitas Claims*, in the *Insurance Institute of London Journal* 1998, p.62 *et seq.* *Ibid.*, p.63:-

Perhaps the most mind-boggling of the Equitas statistics relates to the volume of paper inherited from the syndicates reinsured who produced 400 million pages of documents which we must retain. If placed end-to-end, this would stretch some three times around the Earth at the equator Now, that’s a lot of paper but thankfully, while legally required to retain the majority of this documentation for 80 years, we are not required to read it all!

³⁶¹ For one example chosen at random, see *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265, 360 (Cresswell J), quoting a managing agency functionary’s contemporaneous letter to the managing agency board:-

“[U]ntil 1985 the group maintained handwritten general ledgers which must have made us almost unique as an organisation responsible for turnover running into hundreds of millions. When I joined Merretts I was shocked that so little financial and management information was available.”

And *ibid.*: “The records are poor and in some cases non-existent.”

³⁶² Equitas Claims Unit: Claims Handling Guidelines (undated), §1.3. Note the erroneous use of “syndicate”. Equitas Re is not authorised by any syndicate, only by individual EquitasRe-reinsured SYA participants under RRC 4, §9.

writing and claims computer database. It is believed that in addressing a discovery request, Equitas Re presently interacts minimally or not at all with London insurance companies on the same risk.

disposing of records

- 2.51** Equitas Management Services' Document Retention Guidelines,³⁶³ January 13, 1996 speak of removal of "draft documents" and disposal of "notes or duplicate information".³⁶⁴

³⁶³ One version is dated January 13, 1996.

³⁶⁴ Equitas Management Services' Document Retention Guidelines, January 13, 1996, p.23: "Files no longer required on an active business basis should have draft documents removed and notes or duplicate information disposed of, prior to indexing and archiving."

3: Recourse

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ORIENTATION

principles governing recourse to the Lloyd's enterprise

various idées fixes

- 3.1 The current approach to Equitas Re by some claimant and commuting EquitasRe-assureds-at-Lloyd's appears to be influenced by, and this Chapter addresses, a number of *idées fixes* such as (for example):-

(1) transfer of liability: that liability to discharge an EquitasRe-reinsured insurance contract has been transferred from the EquitasRe-reinsured SYA participant to Equitas Re personally. There appears to be no English law to support such a view, in relation to Equitas Re as RRC 4, §3 reinsurer, as *ibid.*, inward-RTCing source, or (more remotely) as *ibid.*, §9 run-off agent. Nor does any contractual provision appear to be to that effect. Relevant RRC provisions, though confusing,¹ are generally to the contrary,² and there is no express provision to that effect in any EquitasRe-reinsured insurance contract. Nor is there any self-regulatory³ or external insurance regulatory provision to that effect. The particular view that such transfer was effected by RRC 4, §3's RTC component is a *non sequitur* apparently based on misunderstanding of RTC. The (inconsistent) propositions that conventional RTC does not transfer liability to the outward-RTCed SYA participant and EquitasRe-RTC does transfer liability exclusively to Equitas Re are both erroneous.⁴ Given the conduit effect (see next subparagraph), there is no need for any EquitasRe-assured-at-Lloyd's to treat exclusively with Equitas Re personally or to be concerned with its insolvency;

(2) significance of SYA participant: that the EquitasRe-reinsured SYA participant is significant as an individual to paying any EquitasRe-reinsured liability. This view appears to be based on misunderstanding of the ordinary course of business at Lloyd's and the acceptance of mythology⁵ concerning the effect of conventional RTC. The SYA participant as a person, EquitasRe-reinsured or otherwise, is rarely if ever substantively or procedurally relevant to any assured-at-Lloyd's for any purpose, especially including coverage and claims collection. Business at Lloyd's would be unmanageable for insurer and assured were it to be subject to vagaries of any of tens of thousands⁶ of SYA participants, as people, in relation to millions⁷ of separate⁸ insurance contracts. Concerning one aspect only of his personal irrelevance — the payment of claims — the SYA participant is a mere conduit to relevant claims payment securitisation funds at the Lloyd's enterprise, which point clarifies the two fundamentals of any type of RTC, *viz.*, the retention of the liability within the Lloyd's enterprise via the latest conduit SYA participant. That explains why the EquitasRe-reinsured SYA participant,⁹ peculiarly, necessarily remains liable on the EquitasRe-reinsured insurance contract while his conventional outward-RTCed SYA participant counterpart is utterly extricated: in the case of EquitasRe-RTC, no inward-RTCing conduit SYA participant is available, and Equitas Re itself is not a conduit. Given the conduit effect,

¹ For example the elaborate provisions at RRCs 4 and 7 concerning payment by Equitas Re and Equitas Policyholders Trustee respectively to "Insurance Creditors": see p.130.

² See for example RRC 4, recital (J) ("This Agreement is to take effect as a contract of reinsurance and shall have no effect on the liability of any Name or Closed Year Name under any original contract of insurance entered into by such Name or Closed Year Name."); *ibid.*, §3.7; RRC 5, §2.6.

³ New Central Fund Byelaw, §8(3)(b) does not provide that liability has been transferred to anyone. It simply purports to provide how the Council will not pay an EquitasRe-reinsured liability.

⁴ See for example RRC 4, §3.3.

⁵ See p.183 *et seq.*

⁶ 100,000 assuming fifty UYs; 100 SYAs bud in each UY; each SYA has twenty participants. The facts are in each UY's Blue Book.

⁷ Assuming each of 100,000 SYA participants enters into 100 insurance contracts.

⁸ On the SYA-level separate contracts rule, see pp.75, 180.

⁹ See the Glossary of Abbreviations for this term's definition.

there is no need for any EquitasRe-assured-at-Lloyd's to collect — and probably very little financial benefit in attempting to collect — from any EquitasRe-reinsured SYA participant personally or to be concerned with his insolvency;

(3) absence of expressly available recourse: that the EquitasRe-assured-at-Lloyd's has no recourse to expressly available common-use funds at the Lloyd's enterprise, an inherently contradictory proposition. Few provisions are clearer that "Any Matured Claim shall ... be paid by the Trustee by check mailed to the address of the Policyholder or Third Party Claimant solely out of the Trust Fund then in its actual and sole possession ...".¹⁰ If self-regulators-at-Lloyd's and external insurance regulators had intended to deprive any EquitasRe-assured-at-Lloyd's of recourse to relevant common-use funds, they could and presumably would have done so, and in one case actually have done so.¹¹ Because the relevant EquitasRe-reinsured SYA participant is the EquitasRe-assured's-at-Lloyd's only conduit to those funds, there is no necessary benefit and there are a number of potential securitisation hazards in seising Equitas Re with personal liability to any extent exclusory of the liability already expressly assumed by those funds;

(4) absence of arguably available recourse: that the EquitasRe-assured-at-Lloyd's is unable to argue that he has recourse to arguably available common-use funds at the Lloyd's enterprise — which seeks to distinguish itself from conventional insurance companies by representing¹² superior security — an inherently contradictory proposition. Nothing about R&R weakens any relevant recourse argument. Indeed, various features of R&R tend to reinforce availability arguments;¹³

(5) exclusivity of Equitas Re: that the EquitasRe-assured-at-Lloyd's must treat with Equitas Re to the complete exclusion of relevant components of the Lloyd's enterprise, an inherently contradictory proposition. That this is indeed how matters are presently configured — it is convenient for Equitas Re to be the RRC 4, §9 run-off agent instead of (for example) AUA 9 — is largely procedural, not substantive.

rudiments of insurance at Lloyd's

- 3.2** There is extensive mythology and pandemic misunderstanding as to how the Lloyd's enterprise acquires and discharges insurance liabilities. Apparently particularly misunderstood are the relevance of SYA participants, the nature of SYAs and syndicates, and the precise nature of securitisation at Lloyd's including the availability of personal-use and common-use funds including the Central Fund. The rudiments of insurance ordinarily at Lloyd's are non-exhaustively summarised elsewhere.¹⁴

elementary due diligence for the EquitasRe-assured-at-Lloyd's

- 3.3** It follows that, before litigating, settling or otherwise prosecuting his valid claim or seeking to commute a valid insurance contract (whether at Equitas Re or at Lloyd's), or succumbing to the misconceived notion that he will have to pursue the SYA participant directly and personally, the properly advised EquitasRe-assured-at-Lloyd's will wish to take the elementary step of exhaustively ascertaining the existence, nature and availability of every relevant personal-use and common-use fund at Lloyd's. It will be found that expressly-available common-use funds func-

¹⁰ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3. See similarly for example Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.3; LATD, §5.2.

¹¹ In the case of the New Central Fund: see p.129.

¹² See p.118.

¹³ See p.146 *et seq.*

¹⁴ See p.180.

tion as if RRC 4 had never been entered into,¹⁵ and that, in relation to availability-by-argument common-use funds such as (for example) the Central Fund, various aspects of the R&R exercise materially strengthen access arguments. RRC 4's elaborate provisions for payment to the EquitasRe-assured-at-Lloyd's by Equitas Re ordinarily and when using Proportionate Cover,¹⁶ and RRC 7's elaborate provisions for payment to him by Equitas Policyholders Trustee ordinarily and following a RRC 7, §2.15 Insolvency Event at Equitas Re, are a separate and additional claims payment environment of no binding prejudicial effect on the EquitasRe-assured-at-Lloyd's.

common-use funds at the Lloyd's enterprise orientation

- 3.4** An individual severally liable¹⁷ SYA participant, though required to have unlimited exposure to whatever net quantum of insurance liability his managing agency procures for him at whatever net premium, will perforce have limited relevant assets.¹⁸ In particular, his personal-use funds, however voluminous they may by self-regulators-at-Lloyd's be represented¹⁹ to be, are apt to be small relative to his insurance liabilities. Apparently in recognition²⁰ rather than limitation²¹ of the Lloyd's enterprise's liability, a variety of common-use funds is furnished by self-regulators-at-Lloyd's in conjunction with (increasingly self-informed²²) external insurance regulators, and held in various places: for example, the Central Fund²³ in London (by the Corporation as custodian²⁴); LATFs, Lloyd's US Surplus-Lines Common-Use Trust Fund and Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund in New York (by Citibank as trustee). Once relevant personal-use funds are no longer available, the SYA participant is merely a hollow conduit to relevant common-use funds, not to such assets as can be marshalled by his trustee in bankruptcy. Were it otherwise to any extent, insurance business could not feasibly be conducted at Lloyd's. Hence self-regulators'-at-Lloyd's "chain of security" representations.²⁵ Common-use funds necessarily bespeak the potential inadequacy of personal-use funds. Common-use funds should be presumed to be immutably, inexorably and permanently attached to the relevant SYA partici-

¹⁵ However, two events do bear on such recourse. First, a settlement entered into by the EquitasRe-assured-at-Lloyd's releasing relevant EquitasRe-reinsured SYA participants prevents him from having a "Matured Claim" for purposes of Lloyd's US Surplus-Lines Common-Use Trust Fund and Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund. Ditto a judgment or arbitral award against Equitas Re personally, demonstrating one danger in seeking to fix Equitas Re as assumption reinsurer with sole liability under an EquitasRe-reinsured insurance contract.

¹⁶ See p.235.

¹⁷ *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402-3 (CA). Per *ibid.*:-

We cannot see that agreements or arrangements which involve names in making mutual provision against the risk of individual default are in conflict with or outside the scope of the venture of an insurance business in which each name accepts liability solely for his own account.

¹⁸ Self-regulators at Lloyd's view is particularly misguided that any PTF (or other personal-use fund) can be a "guarantee" that the SYA participant will be able to pay his insurance liabilities (there would otherwise be no need for cash calls: *Napier and Ettrick v R. F. Kershaw Ltd.* {1c and 2c} [1999] 1 WLR 756, 766 (Lord Steyn: the PTD in issue "is a means of creating a form of security in favour of policyholders. It provides a guarantee that a Name will be able to meet his liabilities ...").

¹⁹ See for example Corporation RA fye December 31, 2000, p.32; Corporation RA fye December 31, 1999, p.32.

²⁰ See for example CP 16, §94: "Prudential regulation of Lloyd's is complicated by the fact that Lloyd's consists many individual insurers whose assets are not pooled and most of whom would not have the financial resources to be acceptable to supervisors as stand-alone insurers transacting similar levels of business. It is the existence of centrally-held resources, in particular the Central Fund, that underpins a high level of security for Lloyd's policies."

²¹ No dedicated common-use fund instrument, including the Old Central Fund Byelaw and the New Central Fund Byelaw, declares that recourse is limited to it alone. External insurance regulatorily prescribed levels are minimum, not maximum, and reflect demands upon them, not inherent limitations of the Lloyd's enterprise's liability.

²² See for example *NYID Report 1995*; *NAIC Review 1998*; *NAIC Review 1999*.

²³ Query the propriety of the New Central Fund Byelaw's restrictions on contributions, and of Central Fund dispositions, to pay EquitasRe-reinsured liabilities: see p.130.

²⁴ Self-regulators-at-Lloyd's appear to consider that the Corporation beneficially owns the Central Fund: see p.125.

²⁵ See p.118.

pant's relevant outstanding liabilities, regardless of his personal and financial circumstances, including the nature, quality, amount and extent of his outward reinsurance.

- 3.5** In contrast to a personal-use fund, a common-use fund is the recipient of the assured's-at-Lloyd's aggregated claim against all SYA participants liable on the same particular insurance transaction, not against just one SYA participant. Ascertaining what common-use fund may be available in what circumstances begins, as with personal-use funds, with examination of each relevant fund's governing instrument, from which two types of common-use fund emerge, that available to the assured-at-Lloyd's by express right and that available to him by argument.²⁶ Given apparent claims handling and settlement dynamics at Equitas Re, the existence and availability of relevant common-use funds have a singular and often urgent importance to the EquitasRe-assured-at-Lloyd's.

²⁶ See this Chapter, Sub-chapters 1 and 2 respectively.

peculiarities of disclosure

3.6 Common-use funds appear to be very imperfectly disclosed at Lloyd's. For example:-

(1) common-use funds such as the Old and the New Central Funds, which by the express terms of their governing instruments are *not* expressly available to any assured-at-Lloyd's — indeed, the New Central Fund Byelaw expressly prohibits the New Central Fund's routine use to pay any EquitasRe-reinsured liability — are expressly, persistently and undifferentiatedly disclosed in “chain of security” representations²⁷ to undifferentiated assureds-at-Lloyd's;

(2) such common-use funds at the Lloyd's enterprise as by their governing instruments *are* expressly available to pay claims are not generally disclosed to any potential or actual assured-at-Lloyd's, including by the Lloyd's broker,²⁸ by self-regulators-at-Lloyd's (including in “chain of security” representations), by managing agencies when selling insurance, or by any other component of the Lloyd's enterprise. Some such disclosure as is made is materially misleading.²⁹ This category includes (for example) Lloyd's US Surplus-Lines Common-Use Trust Fund and Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund. Such funds will already be unfamiliar to the assured-at-Lloyd's because ordinarily at Lloyd's the Council's automatic³⁰ deployment of the Central Fund as personal-use-fund float renders recourse to them unnecessary. No external insurance regulation requires that any assured-at-Lloyd's be informed of the nature, details, availability and contents of any common-use fund. It would appear to be in the Lloyd's enterprise's short-term financial interest that such funds are not widely familiar, are not at all accessed for that purpose (enabling the argument that they can be re-directed to other purposes), and that the EquitasRe-assured-at-Lloyd's be under the false impression (which he appears to be) that he must treat exclusively with Equitas Re;

(3) neither Lloyd's Act 1982, s.8(1), Lloyd's policy boilerplate, certificate boilerplate, slip policy boilerplate, nor any insurance contract endorsement usually if ever indicates the existence, number and variety of relevant common-use funds. Indeed, policy boilerplate “each for his own part and not one for the other” *simpliciter* implies that there are no such funds. Copies or summaries of relevant common-use fund instruments are not provided to any assured-at-Lloyd's with his insurance contract documentation. Nor does any document published by self-regulators-at-Lloyd's correctly³¹ elucidate securitisation on the Lloyd's enterprise's insolvency;

(4) various FSA Lloyd's Rulebook provisions³² expressly requiring the availability of Corporation personal assets to pay claims are not disclosed at all in “chain of security” representations.

orientationally classified

3.7 A particular common-use fund's availability to an assured-at-Lloyd's is principally set out, not always dispositively,³³ in its governing instrument,³⁴ to which extent³⁵ common-use funds (un-

²⁷ See p.118.

²⁸ It is believed to be extremely rare for the Lloyd's broker to advise the EquitasRe-assured-at-Lloyd's of the availability of particular relevant claims payment securitisation funds at the Lloyd's enterprise, or to assist the EquitasRe-assured-at-Lloyd's in accessing them — either generally or in the event that the Lloyd's broker may have already presided over the client recovering from Equitas Re materially less than 100% of his due claim. The Lloyd's broker's liability for the EquitasRe-assured's-at-Lloyd's failure to recover 100% of a valid claim is discussed at p.175.

²⁹ See p.159.

³⁰ See p.126.

³¹ For apparently misleading indications by self-regulators-at-Lloyd's, see p104.

³² See p.143.

³³ Some governing instruments purport, query validly, to make a fund available only at the Council's discretion: see this Chapter, Sub-chapter 2.

³⁴ The governing instruments of relevant personal-use and common-use claims payment securitisation funds are considered in detail at *Astor's Law of Lloyd's*, 2nd Ed.

derstanding of which continues to be impeded by the multiply infelicitous term “joint asset”³⁵) can for present purposes be categorised in terms of the EquitasRe-assured-at-Lloyd’s:-

(1) having an express entitlement, if certain pre-conditions be satisfied, to payment out of the fund of 100% of his claim (either at its primordial level or as reduced by agreement with Equitas Re as each relevant EquitasRe-reinsured SYA participant’s RRC 4, §9 run-off agent). Relevant funds — including (for example) LATFs, Lloyd’s US Surplus-Lines Common-Use Trust Fund³⁷ and the Lloyd’s US Credit-for-Reinsurance Common-Use Trust Fund — are largely unfamiliar to assureds-at-Lloyd’s and, singularly, none is referred to in self-regulators’-at-Lloyd’s “chain of security” imagery, largely because the Council has traditionally used the Central Fund as a 100% personal-use-fund float, thus protecting them. Absent relevant amendment, those funds by definition remain susceptible to eligible claims, in relation to which the Lloyd’s broker’s and self-regulators’-at-Lloyd’s failure to advise the EquitasRe-assured-at-Lloyd’s on his recourse rights and deliberate channelling of his claim solely to Equitas Re, the EquitasRe-reinsured SYA participant’s purchase of outward reinsurance (including from Equitas Re), and the identity, functions and powers of his run-off agent are mere extranea. No expressly-available common-use fund is expressly or impliedly conditional on Equitas Re’s solvency, insolvency,³⁸ RRC 4, §3 performance, or the EquitasRe-assured’s-at-Lloyd’s exhaustion of remedies at or in relation to Equitas Re. As to whether the RRC 4, §3 product is reinsurance or RTC, no such fund materially distinguishes between a pure YA liability and an inward-RTCd liability — at Equitas Re or elsewhere — including fund deeds which expressly³⁹ recognise the distinction;

(2) having no express entitlement to payment out from the fund, but where sound arguments are available that such payment should be made to him. Relevant instruments include the Old Central Fund Byelaw and the New Central Fund Byelaw (and possibly⁴⁰ Lloyd’s Act 1911, s.7) in relation to the Central Fund, and Lloyd’s Act 1911, s.7 (and to some⁴¹ extent the Old Central Fund Byelaw, §§8 and 8A) in relation to the Corporation’s (other) personal assets. Neither is expressly available as of right to any assured-at-Lloyd’s. The New Central Fund Byelaw, represented⁴² by self-regulators-at-Lloyd’s as available to pay all claims, purports to prohibit the fund’s use to pay any EquitasRe-assured’s-at-Lloyd’s claim.

³⁵ Another categorisation is dedicated and not dedicated. RRC 4 uses the terms “Dedicated Available Assets” (defined at RRC 4, Sch. 2, §1) and “Non-Dedicated Available Assets” (defined at *ibid.*)

³⁶ There is nothing joint about liability at Lloyd’s, either at SYA level (see Lloyd’s Act 1982, s.8(1)) or at Membership level (all relevant byelaws happen to prescribe several liability for severalised contributions to personal-use and common-use claims payment securitisation funds). See incidentally RRC 4, recital (J) (“The liability of the relevant Names or Closed Year Names under all contracts of insurance underwritten by them shall remain several and not joint”). “Common-use” is a coinage of the Author.

³⁷ See Appendix 2.3.

³⁸ Conceptually separately, Equitas Re’s insolvency does impinge on NYID’s power to seize the EATF (EATD, §12(c)) and relevant LATFs (LATD, §18.3).

³⁹ As does, for example, LATD: see *ibid.*, §§1.1, 1.3.

⁴⁰ If self-regulators-at-Lloyd’s are correct that the Corporation owns the Central Fund: see p.125.

⁴¹ *Viz.*, to the extent that those and other byelaw provisions do not conflict adversely with Lloyd’s Act 1911, s.7 and other relevant superior provisions.

⁴² See p.118.

Sub-ch. 1: funds at the Lloyd's enterprise: recourse by express right

SCOPE OF THE SUB-CHAPTER

- 3.8 A variety of recourse funds is available by express right to the EquitasRe-reinsured SYA participant. This Edition confines discussion to the two principal US “joint asset” trust funds, Lloyd's US Surplus-Lines Common-Use Trust Fund⁴³ and Lloyd's US Credit-for-Reinsurance Trust Fund.⁴⁴

TWO US COMMON-USE TRUST FUNDS

some shared key provisions

generally

- 3.9 Each relevant SYA participant selling insurance in the surplus-lines market, and selling insurance to insurance companies, furnishes (in appropriate circumstances) his own dedicated personal-use trust fund⁴⁵ and contributes⁴⁶ to dedicated common-use trust funds.⁴⁷ Neither Lloyd's US Surplus-Lines Common-Use Trust Fund and Lloyd's US Credit-for-Reinsurance Trust Fund distinguishes between relevant insurance liabilities conventionally at Lloyd's and EquitasRe-reinsured liabilities: both are equally covered to the extent they exist in the first place. The two common-use trust funds were established at the same time⁴⁸ and are similar in terms,⁴⁹ especially

⁴³ For extracts from the Lloyd's US Surplus-Lines Common-Use Trust Deed, see Appendix 2.3.

⁴⁴ For extracts from the Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, see Appendix 2.3.

⁴⁵ *Viz.*, Lloyd's US Surplus-Lines Personal-Use Trust Fund and Lloyd's US CR Personal-Use Trust Fund.

⁴⁶ See for example Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, introductory §, “Current Contributors to the Trust Fund ... all persons now or becoming Current Contributors to the Trust Fund to be collectively Grantors of the Trusts hereunder ...”; *ibid.*, second recital (“Underwriters have heretofore established a trust fund in the United States ...”), etc. On contributions to those funds, see *ibid.*, p.1-2:-

“Under these proposals, members’ agents will be required to execute either or both of the amended JATD(s) on behalf of the underwriting members for whom they act where those members participate on syndicates currently writing either or both categories of business. A model form of resolution for members’ agents for the purpose is attached (JATD1/2). Sole corporate members (i.e. corporate members that do not have a members’ agent) will also be required to execute the relevant amended JATD(s) where they participate on syndicates currently writing either or both categories of business. A model form of resolution for sole corporate members for the purpose is attached (JATD3/4).”

And see for example Mkt. Bn. X715, March 22, 1995 (“USA: joint asset trust funds”). *Ibid.*, p.1-2:-

“The calculation of each syndicate’s new contribution will be based on signed premium income at LPSP for 1994 for reinsurance and surplus lines business respectively for the two funds. Only syndicates with live 1995 accounts will be required to contribute. Any new syndicates starting up in 1995 will be required to contribute based on their forecast premium income for 1995 which should be provided on the attached schedule (appendix 3). The requirements for both trusts remains at US\$100 million of admitted assets in each trust. To ensure that this requirement is met throughout the period without having to resort to additional collections and in line with last year a sum of US\$105 million will be collected for each of the trust funds. The authorities signed in December 1993 were in respect of the 1993 and 1994 collections. These authorities will now be required to be renewed annually to reflect the changing stamp each year. The two attached letters and schedules (appendices 1 & 2) must be signed and completed by Managing Agents and returned immediately to this department to provide the necessary authority to Lloyd's personnel to deal with the trust funds on behalf of the contributing syndicates in 1995. Agents should be aware that failure to complete and return these Authorities by 30 March 1995 could lead to syndicates being prevented from writing the relevant classes of business.”

[Appendix 1] “To the Council of Lloyd's: Dear Sirs — Re: Lloyd's American Credit for Reinsurance Joint Asset Trust Deed (“the trust deed”) — We, the undersigned, in our capacity as underwriting agents for certain Underwriters, being the members for the time being of the syndicates listed in the Schedule attached hereto, hereby authorise the Council of Lloyd's and the Chairman and a Deputy Chairman of Lloyd's severally to exercise all the powers and rights of the Underwriters pursuant to the Trust Deed and to delegate this authorisation to any person or persons and to designate from time to time any person or persons as a Lloyd's Signatory and to notify the Trustee of this authorisation, any delegation of this authorisation and any designation of a Lloyd's Signatory on behalf of the underwriters. Unless the context otherwise requires, the words and expressions used in this letter bear the meanings ascribed in them in the Lloyd's American Credit for Reinsurance Joint Asset Trust Deed executed on 15th September 1993.”

⁴⁷ *Viz.*, Lloyd's US Surplus-Lines Common-Use Trust Fund and Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund.

⁴⁸ See for example *SOD*, p.131-132:-

in relation to (for example) “Underwriters”,⁵⁰ “Trust Fund Minimum Amount”,⁵¹ “Claim”,⁵² “Matured Claim”,⁵³ “Domiciliary Commissioner”,⁵⁴ and governing law⁵⁵ (New York). Each deed deals with (for example) duration of the trust fund;⁵⁶ priority of payments out of the fund;⁵⁷ circumscription of the claimant’s rights against the trust fund;⁵⁸ management of the trust fund;⁵⁹ trust fund assets;⁶⁰ the Trustee’s obligation to certify trust fund assets⁶¹ and furnish information;⁶² the Trustee’s duties on the trust’s termination;⁶³ trust fund insufficiency;⁶⁴ and general matters concerning the Trustee’s tenure, duties and entitlement to fees and expenses.⁶⁵ There are also familiar provisions protecting the Trustee from liability⁶⁶ and excluding duty-interest conflict rules.⁶⁷

[I]n the United States Lloyd’s has established two JATFs, one (the Lloyd’s American Surplus or Excess Lines Insurance Joint Asset Trust Fund) to support surplus lines policies and the other (the Lloyd’s American Credit for Reinsurance Joint Asset Trust Fund) to support reinsurance policies. Under the JATF trust arrangements entered into by Lloyd’s and approved by the New York Insurance Department, Lloyd’s is required to maintain at least US \$104 million in each of the JATFs. In the event that Equitas were unable to make payments in full on a claim by a US surplus lines or reinsurance policy allocated to 1992 or a prior year of account (either directly or through the Equitas American Trust Fund), payment of any shortfall could be realised from the respective JATF. If the balance in such JATF were then to fall below US \$104 million the then on-going market would be required to replenish the funds in such JATF in order to continue to be able to write such lines of business in the US. Such payments would be made by Lloyd’s from the New Central Fund. Therefore, Names writing in later years would be contributing indirectly to payments to satisfy obligations for 1992 and prior business. If subsequently there are insufficient funds to pay a policyholder’s claim in the respective JATF (or the payment obligation is with respect to a line of business not secured by a JATF or other trust arrangement), the policyholder could pursue the relevant Names directly.

- ⁴⁹ See contemporaneously for example Mkt. Bn Y1030, December 4, 1998 (“US surplus lines trust deeds”), and *ibid.*, App. 3; Mkt. Bn. X904, July 28, 1995 (“New US trading arrangements — Lloyd’s American joint asset trust deeds”).
- ⁵⁰ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.22; Lloyd’s US CR Common-Use Trust Deed, §1.12.
- ⁵¹ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.7; Lloyd’s US CR Common-Use Trust Deed, §2.7.
- ⁵² Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.3; Lloyd’s US CR Common-Use Trust Deed, §1.3.
- ⁵³ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.12, and see *ibid.*, §2.3; Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §1.5, and see *ibid.*, §2.3.
- ⁵⁴ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.7; Lloyd’s US CR Common-Use Trust Deed, §1.8.
- ⁵⁵ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §5.1; Lloyd’s US CR Common-Use Trust Deed, §5.1.
- ⁵⁶ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.1; Lloyd’s US CR Common-Use Trust Deed, §2.1.
- ⁵⁷ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.2; Lloyd’s US CR Common-Use Trust Deed, §2.2.
- ⁵⁸ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.4; Lloyd’s US CR Common-Use Trust Deed, §2.4.
- ⁵⁹ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.6; Lloyd’s US CR Common-Use Trust Deed, §2.6.
- ⁶⁰ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.12; Lloyd’s US CR Common-Use Trust Deed, §2.11.
- ⁶¹ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.13; Lloyd’s US CR Common-Use Trust Deed, §2.12.
- ⁶² Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.14; Lloyd’s US CR Common-Use Trust Deed, §2.13.
- ⁶³ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.15; Lloyd’s US CR Common-Use Trust Deed, §2.14.
- ⁶⁴ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.1 *et seq.*; Lloyd’s US CR Common-Use Trust Deed, §4.1 *et seq.*
- ⁶⁵ See generally Lloyd’s US Surplus-Lines Common-Use Trust Deed, §3; Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §3.
- ⁶⁶ See for example Lloyd’s US Surplus-Lines Common-Use Trust Deed, §§3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 3.13, 3.15, 3.16; Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §§3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 3.13, 3.15, 3.16.
- ⁶⁷ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §3.15; Lloyd’s US CR Common-Use Trust Deed, §3.15.

seizure for “insolvency”; irrelevance of Equitas Re

- 3.10** The assets under the control of each deed are subject to seizure by the NYID, and to distribution under New York Insurance Law, Art. 74, on “insolvency”,⁶⁸ which can be precipitated by the mere threatened satisfaction out of the fund of a particular eligible claim.⁶⁹ Any such seizure may have the effect of depriving of 100% indemnity not only the particular EquitasRe-assured-at-Lloyd’s whose eligible claim precipitated the insufficiency but also every other potential subsequent relevant claimant. Equitas Re’s insolvency has no bearing whatever on the sufficiency or insolvency of either fund — Equitas Re is not even mentioned in either relevant deed — and is not an express ground on which NYID or any other body is empowered to freeze or seize the assets of either fund.

Lloyd’s US Surplus-Lines Common-Use Trust Fund orientation

- 3.11** The Lloyd’s enterprise appears to have made a special effort to preserve its surplus lines business.⁷⁰ Lloyd’s US Surplus-Lines Common-Use Trust Deed,⁷¹ the common-use counterpart of US Surplus-Lines Personal-Use Trust Deed, recites the existence of “Policyholders in the United States of America as a result of accepting insurance exported to them pursuant to surplus or excess lines laws of the several states covering risks therein”;⁷² and indicates that the trust fund is to both secure those assureds plus Third Party Claimants and enable “Underwriters” to qualify as “an eligible or approved surplus or excess lines insurer” in those US states.⁷³ The parties are the Corporation, the Grantors and the Trustee⁷⁴ (Citibank NA); further signatories are envisaged.⁷⁵ Further contributions accruing to the trust fund are subject to the deed.⁷⁶ The Trustee administers the trust fund principally from its New York City office.⁷⁷ The Grantors are “Current Contributors” (as defined⁷⁸) collectively.⁷⁹ The apparent value of trust fund assets as at the date of execu-

⁶⁸ See generally Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.1 *et seq.*; Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §4.1 *et seq.*

⁶⁹ See for example Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.1(b)(ii); Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §4.1(b)(ii).

⁷⁰ See for example contemporaneously Market Bulletin X930, August 18, 1995 (“US trading basis: surplus lines business transacted under bulked accounting contracts”). *Ibid.*, p.1:-

Following the market bulletin dated 8 August 1995, the Non-Marine Association convened a group of non-marine underwriters and brokers to consider the implications of the changes to bulked-accounting contracts covering direct US surplus lines business. The meeting was also attended by representatives from this office, LPSO and LeBoeuf. ... It was unanimously agreed that it would be extremely unhelpful to give blanket notice of cancellation on binding authorities as this would send the wrong message about Lloyd’s to our Coverholders some of whom are voicing concern. It is the responsibility of those syndicates who no longer wish to trade forward to advise the broker accordingly so that the line in the majority of cases can be replaced, hopefully at Lloyd’s.

⁷¹ See this Edition, Appendix 2.3.

⁷² Lloyd’s US Surplus-Lines Common-Use Trust Deed, first recital. *Ibid.* does not say why the assured is in the US, or where the risk is.

⁷³ Lloyd’s US Surplus-Lines Common-Use Trust Deed, second recital.

⁷⁴ Lloyd’s US Surplus-Lines Common-Use Trust Deed, [introductory §]

⁷⁵ Lloyd’s US Surplus-Lines Common-Use Trust Deed, [introductory §] (“... and will in [the] future be executed and acceded to by those persons (whether individuals, bodies corporate or partnerships and whether or not Underwriters at Lloyd’s London) who become in the future Current Contributors to the Trust Fund ...”).

⁷⁶ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.9.

⁷⁷ Lloyd’s US Surplus-Lines Common-Use Trust Deed, fourth recital.

⁷⁸ *Per* Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.6, “Current Contributors” means:-
those persons (whether individuals, bodies corporate or partnerships and whether or not Underwriters) whose contributions to the Trust Fund constitute the principal of the Trust Fund for the time being, the total amount contributed for the time being to be the “Current Contributions,” and each contribution to the Trust Fund to be a “Current Contribution.”

⁷⁹ Lloyd’s US Surplus-Lines Common-Use Trust Deed, introductory §.

tion was at least the Trust Fund Minimum Amount;⁸⁰ detailed provisions permit the Council to direct the Trustee to pay over excess funds.⁸¹

trusts; form of trust assets; trust term

- 3.12** The Lloyd's US Surplus-Lines Common-Use Trust Deed's trusts are in favour of any "Beneficiary"⁸² to pay "Claims"⁸³ under an "American Policy".⁸⁴ As a general rule,⁸⁵ the Trustee must retain trust assets in their current form.⁸⁶ Current Contributors via the Lloyd's Signatory are entitled to substitute US cash or specifically designated "Readily Marketable Securities" (as defined⁸⁷) subject to not reducing the fund below the Trust Fund Minimum Amount.⁸⁸ The Trustee has wide discretion to sell trust fund assets to pay Matured Claims.⁸⁹ The trust fund established by the trust deed cannot be revoked,⁹⁰ and is required to persist either: (1) for at least five years from the date on which the Council gives the Trustee written notice of the trust's termination;⁹¹ or (2) for sixty days after the Council has sent written notice to the Trustee either that all Underwriters have become qualified and licensed to conduct insurance business in all US states "where they have direct insurance in force",⁹² or have entered into an assumption and assignment agreement creating a novation transferring all liability for all risks covered by the trust fund to an insurer licensed to do insurance business in those states or to an insurer "listed by the IID".⁹³ In either case, the written notice must include a list of all US states in which the Underwriters have American Policies in force.⁹⁴

⁸⁰ Lloyd's US Surplus-Lines Common-Use Trust Deed, fifth recital.

⁸¹ See Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.10:-

From time to time the Council may direct the Trustee in writing pursuant to Paragraph 3.6 to pay over any funds in excess of the trust Fund Minimum Amount set forth in Paragraph 2.7 to each trust fund relating to the Lloyd's underwriting business of the Current Contributors from which one or more Current Contributions have been made and to each Current Contributor who has made one or more direct Current Contributions, in shares bearing the same ratio to the total amount payable as each Current Contribution bears to the total of Current Contributions. For this purpose, funds withdrawn by Current Contributors as of the end of a Contribution Period shall be considered to be funds in excess of the [Trust Fund] Minimum Amount, but only if and to the extent that the funds so withdrawn are replaced by Current Contributions from the succeeding Current Contributors[.]

⁸² *Per* Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.2, "Beneficiary" means any "Policyholder" or "Third Party Claimant" ("Third Party" not hyphenated in *ibid.*, §1.2). *Per ibid.*, §1.15, "Policyholder" means "the holder of an American Policy resident or doing business in the United States, and any other persons or associations who are assignees, pledgees, or mortgagees named therein". *Per ibid.*, §1.19, "Third-Party Claimant" (note hyphen) means "one not a party to the insurance contract but having a final judgment or arbitration award against Underwriters for Claims or Loss covered by an American Policy". *Per ibid.*, §1.22, "Underwriters" means "underwriters at Lloyd's London and such former underwriters at Lloyd's London as continue to have underwriting business at Lloyd's not fully wound up and the personal representatives or trustee in bankruptcy of any such underwriter or former underwriter who has died or become bankrupt[.]"

Note the error "former underwriters at Lloyd's London": there is no such group. Presumably "former Members" is meant. The error unwittingly underlines the insurer's continuing contractual liability notwithstanding termination of Membership.

⁸³ Defined at Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.3.

⁸⁴ Defined at Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.1.

⁸⁵ *Viz.*, unless otherwise directed by the Council or Lloyd's US SL Common-Use Trust Deed, §2.5(b): *ibid.*, §2.5(a).

⁸⁶ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.5(a).

⁸⁷ Defined at Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.17.

⁸⁸ Lloyd's US SL Common-Use Trust Deed, §4.7. The value of the substituted assets is determined by the Trustee at the time of substitution in accordance with "general business practices as determined in the discretion of the Trustee": *ibid.*

⁸⁹ See the detailed provisions at Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.5(b).

⁹⁰ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.1, which erroneously says that the trust *fund* is irrevocable.

⁹¹ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.1(a).

⁹² Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.1(b)(i).

⁹³ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.1(b)(ii).

⁹⁴ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.1(b).

paying out trust monies

- 3.13** Priority of payments out is: (1) first, to pay relevant specified fees and expenses;⁹⁵ (2) second, to use any surplus to pay a “Matured Claim” (as defined⁹⁶) for a “Loss” (as defined), and a “Claim” (as defined) for a “Loss” (as defined); (3) third, to pay a “Matured Claim” for “Unearned Premium” (as defined).⁹⁷ When a Matured Claim has qualified for payment, the Trustee must pay it by certified cheque, mailed to the Policyholder or Third-Party Claimant, solely out of the Trust Fund then in its actual and “sole” possession — on which there are detailed provisions⁹⁸ — without regard, other than in the case of a Matured Claim for Unearned Premium, to the rights of any other Policyholder.⁹⁹ The Policyholder’s or Third-Party Claimant’s right lies solely against the assets in the trust fund.¹⁰⁰ No Policyholder or Third-Party Claimant may require the Trustee to account to him, inquire into the Trust’s administration, question any of the Trustee’s relevant acts or omissions or otherwise enforce the deed,¹⁰¹ his “sole right” being to receive the full amount of the Matured Claim from assets “then” both in the Trust Fund and available for such payment under the deed.¹⁰² If the Trustee determines — relaying on the fund’s most recent valuation¹⁰³ — that paying a Matured Claim would reduce the fund to below the “Trust Fund Minimum Amount” (as defined¹⁰⁴), or if the Trustee had received notice that the Market has ceased trading,¹⁰⁵ the trust deed’s provisions on “Insolvencies”¹⁰⁶ govern.¹⁰⁷ If the Trustee does make such a determination, it must notify the IID, the Domiciliary Commissioner and the “Non-Domiciliary Commissioner”.¹⁰⁸

what is a “Matured Claim”?

- 3.14** A “Matured Claim” is, broadly,¹⁰⁹ a claim satisfying the following five conditions: (1) a Beneficiary has obtained, against a particular Underwriter in respect of his liability under an American Policy — as to which fact there are specific provisions¹¹⁰ — either a final¹¹¹ judgment from a

⁹⁵ See the highly ambiguous first half of Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.2. Given *ibid.*, §3.9’s use of “Trustee Priority Claims” to mean all the fees and expenses contemplated in §3.9, *ibid.*, §2.2’s use of “including [etc.]” is confusing and misleading.

⁹⁶ Defined at Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.12.

⁹⁷ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.2.

⁹⁸ See generally Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.5(b). The Trustee must effect payment in accordance with the Council’s written instructions, if any: *ibid.* If the Trustee does not receive such instructions at least ten days before the expiry of the 30-day period in *ibid.*, §2.3(f), then the remaining provisions of *ibid.*, §2.5(b) govern: the Trustee must have recourse first to cash (*ibid.*, §(i)); then to the sale proceeds of Readily Marketable Securities or other investments other than LCs (*ibid.*, §(ii)); then any other trust fund assets other than LCs (*ibid.*, §(iii)); then LCs (*ibid.*, §(iv)).

⁹⁹ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.3 after (f).

¹⁰⁰ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.4.

¹⁰¹ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.4.

¹⁰² Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.4.

¹⁰³ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.3 after (f).

¹⁰⁴ *Per* Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.7, first sentence, “Trust Fund Minimum Amount” means, broadly (*q.v.* for detailed provisions), whatever amount — being or exceeding US\$104m — that the Council happens to notify in writing to the Trustee. The first sentence’s wording is defective. The Council does not pass on to the Trustee a legal minimum level determined “by law”: there is no such determination. Rather, determination of the Trust Fund Minimum Amount is by the Council itself, to which extent “by law” is unnecessary and misleading: the Council has no legislative powers. The Council may amend that amount from time to time by providing the Trustee with written notice thereof, subject to the fund not falling below US\$104m: *ibid.*, second sentence. Where the Council does not notify the Trustee of a Trust Fund Minimum Amount, that amount is US\$104m.

¹⁰⁵ See generally Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.1.

¹⁰⁶ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.

¹⁰⁷ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.3 after (f). See the curious repetitive wording.

¹⁰⁸ Defined at Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.14.

¹⁰⁹ See the detailed provisions at Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.3.

¹¹⁰ The Trustee is entitled to rely on the Council’s statement that the judgment or award does (or, presumably, does not) relate to liability under an American Policy: Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.3 after (f). If the Council does not notify the Trustee at least ten days before the expiry of the 30-day period, the judgment or award is deemed to

court of competent jurisdiction within the US, its territories or its possessions, or a final¹¹² arbitration award; (2) the Trustee has been served with a certified copy of the judgment or award, plus such proof of its finality as the Trustee may reasonably require;¹¹³ (3) receipt, by an unspecified party (presumably¹¹⁴ the Trustee directly rather than indirectly), of a written sworn unqualified statement from the Beneficiary's lawyer that the Beneficiary has pursued all his rights and remedies against the relevant Underwriter under the Lloyd's American Trust Deed, Lloyd's Central Fund United States Trust Deed, Lloyd's Central Fund United States Trust Deed (Number 2), and Lloyd's United States Surplus Lines Trust Deed, or any replacement, and that the Beneficiary's Claim on Lloyd's US Surplus-Lines Common-Use Trust Deed is net of the remaining unsatisfied after all recourse to the other trust funds has been "exhausted";¹¹⁵ (4) receipt, by an unspecified party, of a written sworn statement from the Beneficiary's lawyer that (among other things¹¹⁶) the Claim does not include exemplary or punitive damages or any extra-contractual obligation not expressly covered by the American Policy, and specifying any Unearned Premium component of the Claim;¹¹⁷ (5) the Trustee — which must "promptly" notify the Council of a Claim that the trustee has deemed to meet the foregoing conditions¹¹⁸ — has been served with the foregoing documents and has not received, within thirty¹¹⁹ days, notice from the Council that the judgment¹²⁰ has been satisfied.¹²¹

"Insolvencies"

- 3.15** Lloyd's US Surplus-Lines Common-Use Trust Deed contains detailed provisions governing the fund's availability in the event of certain defined "insolvencies".¹²² The trust fund is deemed to be insolvent on the earlier of the following: (1) the Trustee receives written notice from the Council, the UK Treasury, the FSA, the Domiciliary Commissioner, any Non-Domiciliary Commissioner or the IID that the Market has ceased trading;¹²³ (2) sixty days after the trust fund's value, as most recently valued, fell below the Trust Fund Minimum Amount or would do so were a Matured Claim to be paid.¹²⁴ The sixty days allows the fund to be supplemented ("re-

relate to liability under an American Policy: *ibid.*, §2.3 after (f). If the Council determines that the judgment or award does *not* relate to liability under an American Policy, the Council must within ten days of the expiry of the 30-day period so notify the Trustee, who in turn must notify the "Domiciliary Commissioner" (defined at *ibid.*, §1.7), who makes his own conclusive determination, binding on "all parties", whether the judgment or award relates to liability under an American Policy: *ibid.* §2.3 after (f).

¹¹¹ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(a)-(b).

¹¹² Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(a)-(b).

¹¹³ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(c).

¹¹⁴ Because see Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(f).

¹¹⁵ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(d).

¹¹⁶ See Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(e) for full provisions.

¹¹⁷ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(e).

¹¹⁸ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3 after (f); apparently in the wrong place.

¹¹⁹ Or whatever lesser period remains before the trust is terminated: Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(f). But see *ibid.*, §2.3 after (f): "The Council may at any time notify the Trustee if such claim has been satisfied prior to the expiration of the period set forth in subparagraph (e) above". "[S]ubparagraph (e)" is error for "subparagraph (f)". It is not clear why this concession is not part of (f).

¹²⁰ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(f) omits, presumably erroneously, mention of an arbitration award, on which see for example *ibid.*, §2.3(a)-(b).

¹²¹ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(f).

¹²² See generally Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.

¹²³ Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.1(a). Where the Market does cease trading, the Council must in any event so notify the Trustee, the Domiciliary Commissioner, all Non-Domiciliary Commissioners, the IID, and Underwriters' US representative: *ibid.*, §4.2(a).

¹²⁴ Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.1(b). On valuation, see *ibid.*, §2.13. The Trustee must "promptly" notify the Council, copy to the Domiciliary Commissioner, all Non-Domiciliary Commissioners, and the IID, of such actual or anticipated fall (*ibid.*), presumably (but not expressly) before the sixty days have expired, presumably to give the Council sufficient time to top up the fund.

plenished”) by or on behalf of the “Underwriters” (as defined¹²⁵) to avoid such a deemed insolvency.¹²⁶ On the occurrence of either event, the Trustee must notify the Council, the Domiciliary Commissioner, all Non-Domiciliary Commissioners, the IID, and Underwriters’ US representative.¹²⁷ There then follows a one-year waiting period, during which, generally,¹²⁸ no Claims other than “Trustee Priority Claims” (as defined¹²⁹) may be paid out of the fund.¹³⁰ The waiting period begins: (1) if because the Market has ceased trading, on the date the Trustee receives written notice of that fact;¹³¹ (2) if because the trust fund has fallen below the Trust Fund Minimum Amount, on the date the Trustee is required to “transmit a notice to the Agent pursuant to Paragraph 4.1(b)”.¹³² The trust fund is then disposed of as directed by the Domiciliary Commissioner or by a US court of competent jurisdiction.¹³³ If the trust fund has been transferred to the Domiciliary Commissioner, he must apply it according to New York law applying to the liquidation of insurance companies,¹³⁴ surplus assets after discharging Trustee’s Priority Claims reverting to the Trustee to then be transferred by it to the Current Contributors “in shares bearing the same ratio to the total amount payable as the total Current Contributions of or attributable to each Current Contributor bears to the total of Current Contributions, as directed by the Council”.¹³⁵

some other provisions

3.16 Lloyd’s US Surplus-Lines Common-Use Trust Deed contains typical provisions concerning (for example) accession,¹³⁶ amendment;¹³⁷ the Trustee’s qualifications,¹³⁸ duties,¹³⁹ powers in connection with trust fund management and investment,¹⁴⁰ record-keeping,¹⁴¹ removal by the Council,¹⁴² resignation¹⁴³ and successors.¹⁴⁴ The deed also covers duty-interest conflicts,¹⁴⁵ the trust-

¹²⁵ See Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.22.

¹²⁶ See generally Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.1(b).

¹²⁷ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.2(b).

¹²⁸ See the detailed provisions at Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.3.

¹²⁹ See Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.2.

¹³⁰ Lloyd’s US Surplus-Lines Common-Use Trust Deed, 4.3.

¹³¹ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.3.

¹³² Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.3. The drafting is defective: there is no such requirement (presumably a word processing error: see US Surplus-Lines Personal-Use Trust Deed, § 5.3). Presumably, the date on which the Trustee sends the *ibid.*, §4.1(b) notice to the *Council* is meant.

¹³³ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.4; *q.v.* for detailed provisions.

¹³⁴ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.5.

¹³⁵ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.5.

¹³⁶ See Lloyd’s US Surplus-Lines Common-Use Trust Deed, §5.9.

¹³⁷ See the detailed provisions at Lloyd’s US Surplus-Lines Common-Use Trust Deed, §5.4.

¹³⁸ *Per* Lloyd’s US Surplus-Lines Common-Use Trust Deed, §3.1, the Trustee must always satisfy *ibid.*, §1.16(a), (b), (c) or (d), *viz.*: (1) be organised and licensed under US federal or state law (or just so licensed if a US office of a foreign banking organisation); (2) be regulated, supervised and examined by appropriate US federal or state regulatory authorities; (3) has been determined by NAIC’s Securities Valuation Office to be an “acceptable financial institution”; (4) has been granted authority to operate with trust powers as a qualified US financial institution to act “as the fiduciary of the trust”: *ibid.*

¹³⁹ See Lloyd’s US Surplus-Lines Common-Use Trust Deed, §3.2.

¹⁴⁰ See Lloyd’s US Surplus-Lines Common-Use Trust Deed, §3.17

¹⁴¹ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §3.10.

¹⁴² Lloyd’s US Surplus-Lines Common-Use Trust Deed, §3.11(b). The removal does not take effect until the Trustee’s fees and expenses have been paid to it: *ibid.*

¹⁴³ Lloyd’s US Surplus-Lines Common-Use Trust Deed, §3.11(a): the Trustee may resign at any time by written notice to the Council, the Domiciliary Commissioner, all Non-Domiciliary Commissioners and the IID to take effect on the date specified by the Trustee in the notice, *viz.*, not less than sixty days from the date of the mailing or personal delivery unless the Council accepts shorter notice as adequate.

¹⁴⁴ See for example Lloyd’s US Surplus-Lines Common-Use Trust Deed, §3.11(b)-(c).

¹⁴⁵ See Lloyd’s US Surplus-Lines Common-Use Trust Deed, §3.15.

tee's liability and indemnification,¹⁴⁶ and expressly protects it in relation to (for example) its own determination of whether a Claim is a Matured Claim;¹⁴⁷ loss incurred in selling trust fund assets;¹⁴⁸ its reliance on information and documents supplied by others¹⁴⁹ and its reliance on Council approval.¹⁵⁰ The deed also covers trust fund management,¹⁵¹ and the Trustee's obligation to prepare a statement of trust fund assets whenever reasonably required by the Council;¹⁵² the Trustee's obligation to certify the existence of and assets in the trust fund, to the IID and the Domiciliary Commissioner, within thirty days of the end of each quarter and whenever so directed;¹⁵³ the Trustee's obligation to provide other information;¹⁵⁴ providing access to the trust assets at the Trustee's office by an authorised representative of a relevant US state;¹⁵⁵ Trustee's fees and expenses;¹⁵⁶ delegation by the Trustee,¹⁵⁷ and the Trustee's duties on termination of the trust fund.¹⁵⁸

Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund

- 3.17** Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed,¹⁵⁹ the common-use counterpart of Lloyd's US Credit-for-Reinsurance Personal-Use Trust Deed, substantially similar overall to those of Lloyd's US Surplus-Lines Common-Use Trust Deed, recites¹⁶⁰ that SYA participants have sold reinsurance to US insurers, and that the fund's purpose is to enable SYA participants to qualify as approved reinsurers in the US.¹⁶¹ The parties are the Corporation, the Trustee, and "Grantors".¹⁶² The deed aspires to the securitisation of claims under an "American Reinsurance Policy"¹⁶³ by a "Ceding Insurer" (as defined,¹⁶⁴ broadly identical to the "Policyholder" in similar

¹⁴⁶ See generally Lloyd's US Surplus-Lines Common-Use Trust Deed, §3.2.

¹⁴⁷ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3 after (f).

¹⁴⁸ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.5(b), but see *ibid.*, §3.13 (Trustee liable for negligence or willful misconduct). Where the trust fund is funded by a LC issued by the Trustee or its affiliate, the Trustee's failure to draw it down where required by the deed to do so is deemed to be negligence and or willful misconduct: *ibid.*

¹⁴⁹ See for example Lloyd's US Surplus-Lines Common-Use Trust Deed, §§3.3, 3.4, 3.5, 3.8.

¹⁵⁰ See Lloyd's US Surplus-Lines Common-Use Trust Deed, §3.16.

¹⁵¹ See the detailed provisions at, for example, Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.6 ("Management of Trust Fund"), 2.11 ("Trustee's Authority to Hold Investments"), 3.18 ("Securities Transactions").

¹⁵² Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.13(a) — at least annually and not more frequently than quarterly: *ibid.* The last sentence in *ibid.*, §2.13(b) — concerning the Council's approval of the statement — appears to belong to *ibid.*, §2.13(a).

¹⁵³ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.13(b).

¹⁵⁴ See Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.14(a). The Trustee must file a statement of trust assets and their fair market value as of the date on which the statement is required if and to the extent such statement is required by US state insurance laws or regulations: *ibid.*

¹⁵⁵ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.14(b).

¹⁵⁶ See generally Lloyd's US Surplus-Lines Common-Use Trust Deed, §3.9.

¹⁵⁷ See for example Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.13(b) (Trustee may appoint agent to value assets in the trust fund).

¹⁵⁸ See the detailed provisions at Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.15.

¹⁵⁹ For extracts from the deed, see Appendix 2.4.

¹⁶⁰ Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, recital [1] ("Underwriters ... have or may have obligations to United States insurers as a result of reinsurance ceded by such ceding insurers to Underwriters").

¹⁶¹ Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, recital [2] ("Underwriters have heretofore established a trust fund in the United States as security for said ceding insurers and to qualify as an approved or accredited reinsurer under the laws of the various jurisdictions in the United States").

¹⁶² Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, introductory §. Every "Current Contributor" is a "Grantor": *ibid.* "Current Contributor" is defined at *ibid.*, §1.13.

¹⁶³ See the definition at Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.1. Cf. Lloyd's US Credit-for-Reinsurance Personal-Use Trust Deed, §12: "American Reinsurance Policy" means:-

(a) any contract or policy of reinsurance (or any agreement to reinsure) inception on or after August 1, 1995 (excluding all contracts or policies of reinsurance underwritten or any agreement to reinsure to be underwritten by the Underwriter as a member of the Syndicate under any binding authority inception prior to that date and attaching on or prior to November 15, 1995) issued to a Ceding Insurer (as defined herein) (i) which is underwritten by the Underwriter as a member of the Syndi-

deeds¹⁶⁵), and is available to pay out direct to any assured-at-Lloyd's having a "Matured Claim", substantially identically to Lloyd's US Surplus-Lines Common-Use Trust Deed (save that an arbitral award has been omitted from the dispute resolution events capable of giving rise to a Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.3 "Matured Claim").

Sub-chapter 2: funds at the Lloyd's enterprise: arguable recourse

PRINCIPAL EXPRESS OBSTACLE TO RECOURSE: DISCRETION

orientation

- 3.18 There presently appears to be no caselaw on any assured's-at-Lloyd's legal right to any assets in either of the purportedly two¹⁶⁶ Central Funds, although the English judicial assumption¹⁶⁷ appears to be that the Central Fund's availability to pay claims goes without saying. To the contrary, the Old Central Fund is purportedly available to pay EquitasRe-reinsured liabilities only at the Council's discretion; the New Central Fund is purportedly¹⁶⁸ available only to pay those liabilities only at the discretion of Members in Corporation general meeting; and the Corporation's (other¹⁶⁹) personal assets¹⁷⁰ are purportedly available to pay those liabilities only at the

cate on or after August 1, 1995, and (ii) which is allocable to the year of account of the Syndicate corresponding to the particular Trust Fund; or (b) any contract or policy of reinsurance (or any agreement to reinsure) underwritten on or after August 1, 1995 issued to a Ceding Insurer (as defined herein) in respect of which the Underwriter is liable as a member of the Syndicate for the year of account of the Syndicate corresponding to the particular Trust Fund to members of the same Syndicate or any other syndicate for an earlier year of account pursuant to any contract of Reinsurance to Close (as defined herein); but for the purposes of subparagraphs (a) and (b) above, excluding any contract or policy of reinsurance, the liabilities for which the Underwriter has provided security by means other than the Trust Fund.

¹⁶⁴ See the definition at Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.2.

¹⁶⁵ See for example Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.15.

¹⁶⁶ There appears to be no legal objection in principle to the Council creating a number of genuine Central Funds. Self-regulators at Lloyd's appear to maintain two so-called Central Funds, the "Old" and the "New" (a distinction apparently not substantively recognised by the FSA). Each has a different governing byelaw, and somewhat different accounts and expressly permitted objects. There appears to be no basis in law for not making "the" Central Fund (in however many different administrative divisions) available, either by express right or discretionarily, to any assured-at-Lloyd's. To the extent that the New Central Fund does purport expressly to be not ordinarily available to pay any EquitasRe-reinsured liability and no other properly called Central Fund exists or is sufficient, *a fortiori* if knowingly insufficient, for that purpose — thereby creating surreptitiously an underclass of assured-at-Lloyd's — the configuration is, arguably, substantively *ultra vires* the Council's Lloyd's Act 1982, s.6(1) and or (2) powers.

¹⁶⁷ See for example *Lloyd's v Clementson* {1} [1995] LRLR 307, 309 (Saville J).

¹⁶⁸ The New Central Fund Byelaw retains (at *ibid.*, §8(1)) the Old Central Fund Byelaw's §7 "may be used" and "may be applied" ambiguity and does not expressly refer to discretion in any relevant place (New Central Fund Byelaw, §10 use of "discretion" is not presently relevant). Instead, it purports to prohibit altogether the New Central Fund's use to pay EquitasRe-reinsured liabilities absent Members' consent in Corporation general meeting: see p.131.

¹⁶⁹ The Council appears to consider that the multi-purpose homogenous Central Fund — which is not a formal trust fund and has no express beneficiaries — forms part of the Corporation's personal assets: see for example Old Central Fund Byelaw, preamble ("The Council of Lloyd's in exercise of its powers under section 6(2) and paragraphs (1) and (4) of schedule 2 of Lloyd's Act 1982 and section 7 of Lloyd's Act 1911 (as amended)"). See similarly New Central Fund Byelaw, preamble ("The Council of Lloyd's in exercise of its powers under section 6(2) of, and paragraphs (1) and (4) of Schedule 2 to, Lloyd's Act 1982 and sections 7 and 9 of Lloyd's Act 1911"). The belief that the Corporation beneficially owns any part of the Central Fund appears to be erroneous. If it does, the Central Fund (and each of whatever number of different so-called Central Funds) is overridingly governed by Lloyd's Act 1911, s.7.

¹⁷⁰ See Lloyd's Act 1911, ss.4, 7 and 9, and the Old Central Fund Byelaw, §8 ("Application of other funds or property of the Society"):-

Monies out of the funds or property of the Society other than the Central Fund may be applied and such funds or property may be charged for any of the following purposes: (a) making good any default by any member of the Society under any contract of insurance underwritten at Lloyd's; (b) preventing the occurrences or reducing the extent of such default by any member of the Society; (c) compensating in whole or in part any person for making for or on behalf of any member of the

Council's discretion. Some of a variety of arguments that the EquitasRe-assured-at-Lloyd's has recourse to all three funds are addressed in this Sub-sub-chapter.

the Old Central Fund: the Council's purported byelaw discretion orientation

- 3.19 Self-regulatorily anomalously¹⁷¹ and not insignificantly, the Central Fund (recourse to which suggests one or more of a number of self-regulatory failures¹⁷²) was established by the Old Committee by contract of adhesion — the May 18, 1927 so-called Central Fund Agreement — rather than by byelaw (promulgation of which in 1927 required sufficient voluntary effort of Members in Corporation general meeting). No such fund is required by Lloyd's Acts 1871-1982¹⁷³ (Lloyd's Act 1982, Sch. 2 does not expressly mention the Central Fund by name in its extensive list of byelaw subjects); and rarely by any external regulatory instrument.¹⁷⁴ Having been contractually established, being contractually self-regulated, and long represented by self-regulators-at-Lloyd's to be a fundamental part of how insurance is sold and securitised at Lloyd's, the Central Fund's existence, nature, size and application have been noticed by external insurance regulators for various purposes such as the solvency of the Lloyd's enterprise as a whole (in the EU,¹⁷⁵ UK,¹⁷⁶ and New York). As overseen by the FSA,¹⁷⁷ which appears to have refrained from promulgating any relevant rules,¹⁷⁸ the Central Fund remains contractual and consensual in nature, an issue principally between the Council and Members for the time being. In relation to the New Central Fund, the Council has purported¹⁷⁹ to prohibit itself from routinely

Society any payment which has had the effect of preventing or reducing such defaults by any such member; (d) extinguishing or reducing the liability of any member of the Society to any person whatsoever, whether or not arising under a contract of insurance where in the opinion of the Council it is expedient for the advancement and protection of the interests of the members of the Society in connection with the business carried on by them as such members.

- ¹⁷¹ The standard self-regulatory device at the time was a byelaw promulgated by Members in two Corporation general meetings: see the now obsolete Lloyd's Act 1871, s.24 (repealed by Lloyd's Act 1982, s.15(1)(a) and *ibid.*, Sch 3; on the Council's exclusive power to promulgate byelaws, see Lloyd's Act 1982, ss.6(1), (2)(a) and *ibid.*, Schedule 2). The accompanying Lloyd's Act 1871, s.26 ("Allowance of byelaws by Recorder") is also obsolete (repealed by Lloyd's Act 1982, s.15(1)(a) and *ibid.*, Sch. 3). The LPSO Agreement 1974 (introduced after *Eagle Star Insurance Company Ltd. v Spratt* [1971] 2 Lloyd's Rep. 116 (CA; and see for example the then Deputy Chairman of Lloyd's February 27, 1975 letter as amended, reproduced at NMA Red Book, vol. 1, p.C20 (April 1992): "During the *Eagle Star v Spratt* and *White* legal case, it became apparent on investigating the written authorities of Underwriters to L.P.S.O. that they were either non-existent or incomplete") is another rare example of self-regulation by agreement rather than byelaw.
- ¹⁷² For example: (1) to timeously monitor the relationship between premium income and ultimate net liability (negligent underwriting); (2) to ensure that FAL are sufficient to cover the Member's Participation Liabilities (including a failure to build up personal reserves to meet monitored or unquantified ultimate net liabilities — looked at another way, the Member's members' agency's failure to anticipate results of its portfolio selection, or failure by the managing agency to give the members' agency sufficient warning); (3) to ensure that the Member's other relevant assets are sufficiently proximate.
- ¹⁷³ But see Lloyd's Act 1911, Schedule ("Corporation of Lloyd's revenue account of underwriters' guarantee fund"), and the inferences at Lloyd's Act 1982, s.15(1)(b) and Schedule 2, §§(1) and (4). Historically, see *Fisher WP*, §24.16 (p.144-5) and *ibid.*, §24.15 (p.144).
- ¹⁷⁴ See now FSA Lloyd's Rulebook, Ch. 3. *Lloyd's v Clementson* {1} [1995] LRLR 307, 326 (Bingham MR; "Lloyd's were unable to point to any national legislation which required that the Central Fund should be established in the way or on the terms it was. It was Lloyd's which adopted the Central Fund Byelaw and Lloyd's which operated the Central Fund. If the Secretary of State had any relevant reserve powers, it is not suggested that he exercised them."). And see *Lloyd's v Clementson* {2} [1997] LRLR 175, 197 etc. (Cresswell J).
- ¹⁷⁵ *Lloyd's v Clementson* {1} [1995] LRLR 307, 326 (Bingham MR); *Lloyd's v Clementson* {2} [1997] LRLR 175, 221 (Cresswell J).
- ¹⁷⁶ And see *Lloyd's v Clementson* {2} [1997] LRLR 175, 198 (Cresswell J; "When assessing the solvency of Lloyd's, the DTI takes into account the provisions in the accounts of syndicates, the capital already committed by Names which is callable to meet claims, the unconditional guarantees that are callable and the Central Fund ..."). And see *ibid.*, 205 ("All members of Lloyd's taken together must satisfy annually the solvency margin requirements under the ICA. For this purpose, the assets and liabilities of all the members of Lloyd's are aggregated. Assets include each Name's funds at Lloyd's, the assets in his premium trust funds and the value of his other assets as shown in his most recent means test, together with the Central Fund and other net assets of Lloyd's").
- ¹⁷⁷ See p.143.
- ¹⁷⁸ FSA Lloyd's Rulebook §3.2.1 is "guidance", not a rule.
- ¹⁷⁹ See p.129.

using that fund to pay any EquitasRe-reinsured liability; has purported¹⁸⁰ to bind itself to the decision of Members in Corporation general meeting as to whether it may use that fund to pay any such liability; and has purported¹⁸¹ to restrict its power to require Members to contribute to the Central Fund whatever sums may be regulatorily appropriate.

summary

3.20 In relation to the Old Central Fund, the Old Central Fund Byelaw has been promulgated by the Council further to Lloyd's Act 1982, s. 6(2),¹⁸² *ibid.*, Sch. 2, §§ (1)¹⁸³ and (4);¹⁸⁴ and Lloyd's Act 1911, s.7.¹⁸⁵ The Old Central Fund Byelaw commenced July 15, 1986¹⁸⁶ and replaced the Central Fund Agreement, May 18, 1927.¹⁸⁷ The Old Central Fund Byelaw provides that the Corporation is to “hold, manage and apply in accordance with the provisions of this byelaw a fund to be known as the Central Fund”¹⁸⁸ and levy contributions from Members.¹⁸⁹ The Old Central Fund comprises the relics of assets of the 1927 Central Fund,¹⁹⁰ Members' contributions formerly levied annually by the Corporation;¹⁹¹ (and which are now the subject of RRC 1 express re-

¹⁸⁰ See p.131.

¹⁸¹ See p.133.

¹⁸² Lloyd's Act 1982, s.6(2):-

The Council may — (a) make such byelaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society, including such byelaws as it thinks fit for any or all of the purposes specified in Schedule 2 to this Act; and (b) amend or revoke any byelaw made or deemed to have been made hereunder.

¹⁸³ Lloyd's Act 1982, Sch. 2, §(1) (“For regulating the admission to the Society of members as either underwriting members or non-underwriting members, for regulating continuing membership of the Society and for regulating the manner and circumstances in which members may be excluded from membership of the Society, and so that any byelaws made for such purposes may impose or provide for conditions and requirements to be satisfied or complied with on admission or during membership, which conditions and requirements — (a) may from time to time be added to, altered or withdrawn; (b) may include the requirement to give undertakings; (c) may apply to all or any class of underwriting members and as to the whole or any class of their underwriting business; and (d) may be imposed notwithstanding any inconsistency therein with any contract subsisting at the commencement of this Act between the Society and any member of the Society: Provided that, without prejudice to the powers of the Council to require an underwriting member to cease or reduce the level of his underwriting at Lloyd's, a member of the Society shall not be excluded from membership for breach of a byelaw or failure to satisfy a condition, requirement or undertaking where such breach or failure consists solely of his inability to satisfy a financial qualification contained in such byelaw, condition, requirement or undertaking, which was not applicable on the date he became an underwriting member or where he has subsequently increased the level of his underwriting, on the date his application to do so was accepted”).

¹⁸⁴ Lloyd's Act 1982, Sch. 2, §(4) (“For regulating the fees, subscriptions and other sums to be paid by members of the Society, annual subscribers, associates, Lloyd's brokers, underwriting agents and others”).

¹⁸⁵ See p.140.

¹⁸⁶ Old Central Fund Byelaw, §12.

¹⁸⁷ Old Central Fund Byelaw, Explanatory Note. Historically, see *Fisher WP*, §24.13-24.16 (p.144-5), *ibid.* §24.13 (p.144), describing the now obsolete May 18, 1927 “Agreement constituting the Central Fund” and subsequent amending measures (all now replaced by Byelaw 4 of 1986 (as amended)). *Ibid.* recommended that the Council should review (1) the purpose for which Central Fund monies may be used: *ibid.*, §24.16(a) (p.144); (2) the investment of Central Fund monies in the light of the purposes for which they may be required: *ibid.*, §24.16(b) (p.144); (3) the provision in the agreement that Central Fund monies may not be applied to pay claims on policies underwritten by a Name until he has been declared in default: *ibid.*, §24.16(c) (p.145); (4) the rates of contribution and the procedure for increasing contributions in case of need: *ibid.*, §24.16(d) (p.145); (5) the practice in relation to the formalities required for adherence to the agreement *ibid.*, §24.16(a) (p.144); *ibid.*, §24.16(e) (p.145). Evolution of the Central Fund is summarised in *Lloyd's v Clementson* {2} [1997] LRLR 175, 210-213 (Cresswell J). On mutual guarantee policies (abolished in 1982), see *ibid.*, 202. On the Central Fund's regulatory shortcomings as alleged by a defendant Member, see for example *Lloyd's v Clementson* {2} [1997] LRLR 175, 224 *et seq.* (Cresswell J).

¹⁸⁸ Old Central Fund Byelaw, §2(a).

¹⁸⁹ Old Central Fund Byelaw, §2(b). The Corporation has no express power to levy any contributions from Members. The Council does have power and does so levy.

¹⁹⁰ Old Central Fund Byelaw, §3(a).

¹⁹¹ Old Central Fund Byelaw, §3(b). See generally *ibid.*, §4. Contribution amounts are as prescribed by Council special resolution (*ibid.*, §4(2)) and payable on such date(s) as prescribed by *ditto* (*ibid.*, §4(3)). The Council has empowered itself to exempt by special resolution any Member or class of Member from such contributions (*ibid.*, §4(6)), generally or particu-

leases); certain money borrowed by the Corporation;¹⁹² relevant investments;¹⁹³ investment income;¹⁹⁴ reimbursement recoveries,¹⁹⁵ and other accretions.¹⁹⁶ The Old Central Fund appears to be inadequate to pay the generality of EquitasRe-reinsured liabilities. The Old Central Fund is expressly capable of being applied to: (1) any purpose;¹⁹⁷ (2) making good any default by any Member under any insurance contract underwritten at Lloyd's;¹⁹⁸ (3) preventing the occurrence or reducing the extent of such default by any Member;¹⁹⁹ (4) compensating in whole or in part any person (including the Corporation) for making for or on behalf of any Member any payment which has the effect of preventing or reducing such default by any such Member;²⁰⁰ (5) extinguishing or reducing any Member's liability to any person, whether or not under an insurance contract;²⁰¹ (6) repaying money previously borrowed for Old Central Fund Byelaw purposes and paying interest, premium or other charges on such monies²⁰² — in each and every case, only “where in the opinion of the Council it is expedient for the advancement and protection of the interests of the members of the Society in connection with the business carried on by them as [Members]”.²⁰³

self-regulators'-at-Lloyd's representations

3.21 The sale of insurance at Lloyd's has long²⁰⁴ been characterised by consistent, chronic, written centralised representations made by self-regulators-at-Lloyd's,²⁰⁵ keen to foster a particular image²⁰⁶ of the Lloyd's enterprise, that claims are paid “at Lloyd's”. *Look into Lloyd's 2002, Chain of Security 2002, Chain of Security (RA 2001) 2002, Security at Lloyd's 2001, and Security at Lloyd's 2001 (short)* are the most recent examples suggesting recognition of an *a priori* collective rather than individual liability for an insurance contract made at Lloyd's (which is indeed how the Lloyd's enterprise is financially configured). A “chain of security”²⁰⁷ is self-regulators'-

larly (*ibid.*, §4(7)). Due payment is a condition of permission to sell insurance at Lloyd's (*ibid.*, §4(11)). Defaulted contributions carry interest (*ibid.*, §6A).

192 Old Central Fund Byelaw, §3(c). *Ibid.*, §5 empowers the Corporation to borrow from time to time, as assets of the Central Fund, “monies in such amounts as are in the opinion of the Council desirable”. Byelaw 4 of 1986, §3(c) and see *ibid.*, §5. The Corporation has power to borrow: Lloyd's Act 1951, s.3 (as amended by Lloyd's Act 1982, Schedule 3).

193 Old Central Fund Byelaw, §3(d). On Old Central Fund management and investment, see *ibid.*, §6.

194 Old Central Fund Byelaw, §3(e).

195 Old Central Fund Byelaw, §3(f); *ibid.*, §§10(1)(a); 10A(5) and (6).

196 Old Central Fund Byelaw, §3(g).

197 Old Central Fund Byelaw, §7(f).

198 Old Central Fund Byelaw, §7(a).

199 Old Central Fund Byelaw, §7(b).

200 Old Central Fund Byelaw, §7(c).

201 Old Central Fund Byelaw, §7(d).

202 Old Central Fund Byelaw, §7(e).

203 Old Central Fund Byelaw, §7. On “advancement and protection”, see Lloyd's Act 1911, s.4, the Corporation's second statutory object.

204 See *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J), discussed at p.160.

205 Representations by managing agencies are exceptionally rare and would be illogical.

206 And see for example self-regulatorily, recently, Policyholder Complaints Byelaw (No. 10 of 2001), §2 (“Every person transacting the business of insurance at Lloyd's must ensure that it handles a complaint made by or on behalf of a policyholder – (a) in accordance with any codes of practice and requirements made by the Council under paragraph 1; and (b) in a manner which properly protects the name, reputation and standing of the Society.”; Underwriting Agents Byelaw (No. 4 of 1984), §8(bc) “in the case of a managing agent – (i) the name, reputation or standing of the Society and of its members”.

207 Judicially considered at for example *Lloyd's v Clementson* {2} [1997] LRLR 175, 201-202, 213-4 (Cresswell J):-

As far as Lloyd's customers and competitors are concerned, Lloyd's has encouraged the belief that a Lloyd's policy will always pay any valid claim. Security at Lloyd's is guaranteed by Lloyd's mechanisms including the Central Fund. The Central Fund is the ultimate safety net whereby all the members have in practice made up the deficiencies caused by individual defaulting Names. All participants in the market have benefited from the security and the brand name of Lloyd's. The protection of policyholders and the passing of the solvency test is critical to Lloyd's competitive position and the attitude adopted to Lloyd's by regulatory authorities around the world.

at-Lloyd's favoured imagery.²⁰⁸ It is said to have four "links",²⁰⁹ viz., a particular SYA participant's PTF-premium,²¹⁰ a particular Member's FAL,²¹¹ a particular natural Member's so-called "other personal wealth" or a particular corporate Member's assets,²¹² and the Central Fund.²¹³ "the ultimate safety net at Lloyd's";²¹⁴ an "integral part"²¹⁵ of funding the payment of claims; a "key feature of Lloyd's";²¹⁶ a "key element in the common security for Lloyd's policies",²¹⁷ etc. Such representations tend to have the following characteristics (among others):-

(1) they suggest that a valid claim will actually be paid: for example, "300 years of paying claims".²¹⁸ The Lloyd's enterprise has represented, and carefully fostered the belief among its

²⁰⁸ See for example *Security at Lloyd's 2000; Strengthening Chain; Future Direction*, App. 1 ("Strengthening Lloyd's chain of security"); *One Lime Street*, June 1997, p.16 ("Lloyd's chain of security"); *One Lime Street*, April 1997, p.14-15 ("Strengthening Lloyd's chain of security"); Mkt. Bn. Y2369, September 20, 2000 ("Security ratings of the Lloyd's market"), etc.

²⁰⁹ See for example *Security at Lloyd's 2000*, unnumbered page headed "Security is of paramount importance":-
All premiums received are held in trust for policyholders. These funds meet the majority of all claims. This for the first link in Lloyd's chain of security. All members are required to hold additional capital at Lloyd's in case it is required to meet claims not fully met under the first link. This forms the second link. Members' other assets are also liable to meet claims, forming the third link. Finally, Lloyd's operates a central fund that is available to meet any portion of any claim that is not met from the first three sources. This constitutes the fourth link in Lloyd's chain of security.

²¹⁰ See for example *Security at Lloyd's 2000*, unnumbered page headed "Liquid assets":-
Members' premiums trust funds form the first link in the chain. This is where all the premium income and any additional reserves are held in trust for the benefit of policyholders. ... Other than paying claims, these funds can only be used to meet permitted expenses

The text fails to distinguish PTF-premium and PTF-personal reserve.

²¹¹ See for example *Security at Lloyd's 2000*, unnumbered page headed "Readily available resources":-
In case the resources in the premiums trust funds prove insufficient to meet obligations to policyholders, every member, both corporate and personal, is required to hold additional capital at Lloyd's. These are also held in trust for the protection of policyholders.

Assureds-at-Lloyd's are *not* the sole beneficiaries under FAL trust deeds.

²¹² See for example *Security at Lloyd's 2000*, unnumbered page headed "All other assets":-
Other assets owned by individual members of Lloyd's are also liable to meet claims on the policies they have underwritten, should the funds in the first two links prove insufficient. Individual members trade with unlimited liability and are liable to the full extent of their personal wealth. ... Corporate members are liable to the extent of their resources. They are often the subsidiaries of leading insurance companies formed specially to participate in the Lloyd's market, whose reputation is at stake should substantial claims arise. Lloyd's has access to all of a member's other resources[.]

An asset has no liability. Note ambiguous use of "individual", especially after "both corporate and personal" at *ibid.*, unnumbered page headed "Readily available resources". The distinction between a natural SYA participant's unlimited liability and a corporate SYA participant's liability is bogus.

²¹³ See for example *Security at Lloyd's 2000*, unnumbered page headed "The central fund":-
The central fund is available in the event that a claim cannot be met from the premiums trust funds or members' assets. Resources available to the fund: £250 million in cash and conservative investments[.] £300 million from members from the premiums trust funds[.] £350 million from an insurance policy with six of the world's top insurers ... The agreement with these companies runs for five years from 1 January 1999 and would come into effect should claims on the central fund exceed £100 million in any one year. It is subject to a maximum payment of £350 million in any one year and £500 million over the five-year period. The involvement of companies such as these testifies to the strength and reputation of the Lloyd's market. The central fund is available to back Lloyd's policies issued after 1993. Policies issued before that date have been reinsured by Equitas, an independent FSA-authorised insurance company. ... Clients can be confident that their claims will be met because Lloyd's has ample resources[.]

²¹⁴ *Lloyd's v Clementson* {2} [1997] LRLR 175, 213 (Cresswell J).

²¹⁵ *Lloyd's v Clementson* {1} [1995] LRLR 307, 309 (Saville J).

²¹⁶ CP 16, §13:-

A key feature of Lloyd's is the Central Fund, to which all members contribute and which is used to pay policyholder claims if a member is unable to meet his obligations under a contract of insurance. (Although the use of the Central Fund is in principle at the discretion of the Council, failure to use it in this way would have severe consequences for Lloyd's continuing ability to trade.) It is on the basis of this common security that Lloyd's is able to trade in other countries with a single licence in each (rather than its individual units having to be licensed separately). The Central Fund underpins the solvency of the market overall since ultimately it links the interests of all capital providers in the market and therefore those of all their policyholders. This linkage, which falls some way short of full mutualisation of risks, has important implications for the way insurance at Lloyd's is regulated.

²¹⁷ CP 48, §3.6.

²¹⁸ Advertisement on the *Business Insurance* website, July 24, 2002.

actual and potential customers, that it has never failed to pay 100% of a valid claim.²¹⁹ *Security at Lloyd's 2001* is particularly clear as to every insurance contract sold by every SYA participant to any assured-at-Lloyd's in any jurisdiction.²²⁰ So is *Security at Lloyd's 2001 (short)*.²²¹

²¹⁹ See for example *Gillespie v Federal Compress & Warehouse Co.*, 37 Tenn. App. 476 (Tenn. App. 1953), 491:-

The policy is executed in the usual manner of all Lloyd's policies, covering in this Country billions of dollars of insurance and reinsurance. The evidence shows that the two large groups of American companies which engage in this field of cotton insurance are reinsured in Lloyd's, as well as the fact that Lloyd's coverage is considered the best in the world; that Lloyd's has been in business since the year before the Revolution of 1688 and has never failed to pay a legitimate claim.

²²⁰ *Security at Lloyd's 2001*:-

Security is of paramount importance to all policyholders. The security of the Lloyd's market underpins its ability to pay claims and its worldwide reputation. The reputation of Lloyd's for first class security is now recognised by two leading independent international rating agencies, A.M. Best and Standard & Poor's, who rate us A- (Excellent) and A (Strong) respectively. These ratings reflect the strength of Lloyd's total resources of £18.6 billion. In addition all policies are backed by security where: All premiums received are held in trust for policyholders. These funds meet the majority of all claims. This forms the first link in Lloyd's chain of security. All members are required to hold additional capital at Lloyd's in case it is required to meet claims not fully met under the first link. This forms the second link. Members' other assets are also liable to meet claims, forming the third link. Finally, Lloyd's operates a central fund that is available to meet any portion of any claim that is not met from the first three sources. This constitutes the fourth link in Lloyd's chain of security. The capital position of Lloyd's remains excellent. The increased requirements on members in respect of their funds at Lloyd's has strengthened the total resources of the market.

Lloyd's operates a stringent system of solvency controls to ensure it meets its own high standards and those of the regulatory authorities. All members have an obligation to keep Lloyd's in funds to meet their underwriting liabilities. The annual solvency process requires the managing agent of each syndicate to estimate all current and future liabilities and to make financial provision for them. An actuary independently validates these estimates. Lloyd's unique system of security means that the total assets available to meet claims compare very favourably with conventional insurance companies and comparison is easier by the Lloyd's Security ratings from A.M. Best and Standard & Poor's. These ratings apply to all syndicates, regardless of their individual performance. Some rating agencies offer products that seek to rank individual syndicates according to performance. These syndicate-based measures are not a measure of security. Syndicates with a lower measure should not be excluded from receiving business on security grounds, as their ultimate security is equal to all others. Lloyd's regulatory management is very strong and independently minded and the lessons of the past have been well learned.

Members' premiums trust funds form the first link in the chain. This is where all the premium income and any additional reserves are held in trust for the benefit of policyholders. Monies are invested conservatively in order that they are available as soon as required. Other than paying claims, these funds can only be used to meet permitted expenses, for example, reinsurance premiums, underwriting expenses and to fund overseas regulatory deposits etc.

LIQUID ASSETS Link 1 — All premium receipts and reserves are held in premiums trust funds. Profits are only distributed when a year of account is closed, normally after three years. Members are unable to receive profits from the funds until the underwriting account has been closed, three years later, and all outstanding liabilities have been provided for. In case the resources in the premiums trust funds prove insufficient to meet obligations to policyholders, every member, both corporate and personal, is required to hold additional capital at Lloyd's. These are also held in trust for the protection of policyholders. To qualify for inclusion these assets must be readily realisable. They include cash securities, letters of credit, bank and other guarantees. Payment of claims takes precedence over distribution of profits[.]

READILY AVAILABLE RESOURCES Link 2 — Capital requirements determined for each member by Lloyd's risk-based capital methodology, subject to prescribed minimum levels. The amount of capital required is determined by the nature and quantity of risk the member underwrites. Those underwriting more volatile business are required to deposit larger funds.

Other assets owned by individual members of Lloyd's are also liable to meet claims on the policies they have underwritten, should the funds in the first two links prove insufficient. Individual members trade with unlimited liability and are liable to the full extent of their personal wealth. This is not shown in Lloyd's accounts, which record only the wealth that has been declared to Lloyd's. Capital amounts are reviewed annually for all members to reflect the risks underwritten[.]

ALL OTHER ASSETS Link 3 — Additional assets not necessarily held at Lloyd's but declared. Frequently members, both corporate and individual, have additional assets which are also liable to be required to meet claims. Individual members trade with unlimited liability. However, shareholders in corporate members have limited liability. Corporate members are liable to the extent of their resources. They are often the subsidiaries of leading insurance companies formed specially to participate in the Lloyd's market, whose reputation is at stake should substantial claims arise. Lloyd's has access to all of a member's other resources[.]

THE CENTRAL FUND Link 4 — The central fund is available in the event that a claim cannot be met from the premiums trust funds or members' assets. Resources available to the fund: £323 million in cash and conservative investments — £300 million from members from the premiums trust funds — £350 million from an insurance policy with six of the world's top insurers: Swiss Re, Employers Re, The St Paul Companies, Hannover Re, XL Mid Ocean Re and Chubb Corp.

The Central Fund is available to meet any portion of any member's liabilities that he is unable to meet in full. In addition to the £323m, the fund is now supported by a five year insurance programme with a limit of £350m in any one year. The Council is also able to call from members' premiums trust funds an up to £300m in any one year. The agreement with these companies runs for five years from 1 January 1999 and would come into effect should claims on the central fund exceed £100 million in any one year. It is subject to a maximum payment of £350 million in any one year and £500 million over the five-year period. The involvement of companies such as these testifies to the strength and reputation of the Lloyd's market. The central fund is available to back Lloyd's policies issued after 1993. Policies issued before that date have been reinsured by Equitas, an independent FSA authorised insurance company. Other assets of the Society of Lloyd's are also available to meet members' underwriting liabilities as a last resort. All figures correct as at 31 December 2000.

Clients can be confident that their claims will be met because Lloyd's has ample resources[.]

(2) they suggest assets at the Lloyd's enterprise — *cf.* at a SYA participant's home address (which in any event would be impractical²²² and never occurs²²³) or at a reinsurer — sufficient to pay claims: "security second to none", "worldbeating security", "unique security", "unparalleled security", "a unique system of providing for future obligations makes the Lloyd's policy the safest that money can buy"²²⁴; "With an A+ rating from A.M.Best the strength of Lloyd's security is clear";²²⁵ and most recently "Every Lloyd's policy is based by an A (Strong) rating from Standard and Poor's."²²⁶

(3) they imply the existence of a single insurance enterprise (it is also express²²⁷). External insurance regulators often use the word "Lloyd's" *simpliciter* as error for SYA participants, and often

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Security at Lloyd's 2001 (short):-

Security is of paramount importance to all policyholders. The security of the Lloyd's market underpins its ability to pay claims and its worldwide reputation. The reputation of Lloyd's for first class security is now recognised by two leading independent international rating agencies, A.M. Best and Standard & Poor's, who rate us A- (Excellent) and A (Strong) respectively. These ratings reflect the strength of Lloyd's total resources of £18.6 billion. In addition all policies are backed by security where: All premiums received are held in trust for policy-holders. These funds meet the majority of all claims. This forms the first link in Lloyd's chain of security. All members are required to hold additional capital at Lloyd's in case it is required to meet claims not fully met under the first link. This forms the second link [.] Members' other assets are also liable to meet claims, forming the third link. Finally, Lloyd's operates a central fund that is available to meet any portion of any claim that is not met from the first three sources. This constitutes the fourth link in Lloyd's chain of security. Lloyd's web site disclaimer Lloyd's provides the materials contained on this site for general information purposes only. Lloyd's accepts no responsibility and shall not be liable for any loss which may arise from reliance upon the information provided. The information and services on this site are not intended for distribution to, or use by, any person or entity in any jurisdiction or country where such distribution or use would be contrary to local law or regulation.

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See p.165.

223

The SYA participant funds various personal-use and various common-use funds, never a claim itself. How the trustees of each relevant fund dispose of fund assets is another matter entirely.

224

Lloyd's home insurance proposal form HIP(94):-

This is an application for insurance to be underwritten by certain Underwriters at Lloyd's of London. Lloyd's offers expertise: our tradition is to tailor and to innovate in order to meet our clients' needs. Lloyd's offers experience: virtually nothing is too large, too small, too complex, too simple or too new to cover Lloyd's offers security: 300 years of paying claims and Lloyd's Underwriters are leaders in the UK home insurance industry.

If insurance contracts (*per* the SYA-level separate contracts rule) result from the application, query if "Lloyd's" is also a party.

225

Financial Times, September 11, 2001, p.7 advertisement. *Ibid.*: "The combination of our security and breadth of vision allows us to underwrite everything from car engines to internet search engines, but all our policies have something in common — every one is tailored to our clients' needs. Lloyd's."

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Look into Lloyd's 2002. Ibid.:-

One marketplace with 86 separate businesses... A networked structure of independent business units, called syndicates, who compete to provide tailored solutions to individual clients' needs. ... For over three centuries businesses have placed their trust in Lloyd's, trust based on Lloyd's unbroken record of paying every valid claim. Every Lloyd's policy is backed by an A (Strong) rating from Standard & Poor's and an A- (Excellent) rating from A.M. Best, offering clients first class security. Lloyd's world-wide reputation and ability to pay claims is underpinned by a system known as the Lloyd's Chain of Security. The first link in the chain is formed by the premiums trust funds, in which all premiums and reserves are held until the underwriting account is closed at the end of three years. The majority of all claims are met from these trust funds. Every member of Lloyd's is required to hold additional capital at Lloyd's to meet claims not fully met by the premiums trust funds. These assets are also held in trust and form the second link in the chain. The assets of individual members and some corporate members, the third link, are also liable to meet claims. Lloyd's operates a central fund that is available (at the discretion of the Council of Lloyd's) to meet any portion of any claim that is not met from the first three sources.

Syndicates are not independent businesses and do not compete. The booklet's "Contact us" page lists the phone numbers, by country, of Corporation local representatives, not managing agency representatives. No mention is made of EquitasRe-reinsurers liabilities.

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Financial Times, September 4, 2000, *Reinsurance* supplement, p.IV ("Victorian pipework to be replaced"), quoting the Corporation's then CEO:-

treat its components as if one²²⁸ single enterprise for the purpose of (for example) some solvency tests and some common-use claims securitisation devices. More particularly, the notion often arises,²²⁹ in various contexts and for various purposes, that the Lloyd's enterprise's numerous disparate components are or amount to an homogenous (and wealthy²³⁰) single entity²³¹ (some-

"There is one fundamental distinction between Lloyd's and the London company market. Lloyd's is a single licensed, regulated entity with a brand name and a system of financial security. The London company market is a collection of companies represented by a trade association. Therefore, there is a lot of difference."

Errors include: (1) the Corporation is not licensed to and never does sell insurance; (2) the Corporation is not synonymous with SYA participants; (3) SYA participants are not and cannot under any circumstances properly be described as a "single entity"; (4) apart from the Central Fund, no unfettered common-use fund exists at Lloyd's to pay claims. And see for example *Security at Lloyd's 2000*, unnumbered page beginning "Security is of paramount importance" (italics added):-

Security is of paramount importance to all policyholders. The security of the Lloyd's market underpins its ability to pay claims and its worldwide reputation.

And see recently for example the terminological error at Corporation press release LL12/00, February 12, 2000 ("Lloyd's announces new representative in Australia"), p.2 ("Lloyd's has traded in Australia since early in the last century. ... The business written by Lloyd's is predominantly property ...") — the Corporation has never sold property or other insurance in Australia.

228 See for example, apparently, Prudential Guidance Note 1994/4 (November 1994) ("Guidance notes for applicants to carry on business in the United Kingdom"), §51(c) ("No single reinsurer (apart from Lloyd's) ...").

229 See for example *Luce v Lloyd's of London* 868 F. Supp. 625, 627 (D. Vt. 1994); *Portavon Cinema Co Ltd. v Price and Century Insurance Co. Ltd.* [1939] 4 All ER 601 (Branson J). And see *In the Matter of Lloyd's of London [etc.]* Pennsylvania Securities Commission, Administrative Proceeding Docket No. 9412-10, Summary Order to Cease and Desist, §1 (p.1): "Lloyd's of London is a common enterprise consisting of the following entities and individuals: the Council of Lloyd's ..., also known as the Society of Lloyd's; the Corporation of Lloyd's...; Members' Agents, Managing Agents, Lloyd's brokers, and Lloyd's Names."

And see *In the Matter of the Offering of Securities by Lloyd's [etc.]*, Docket No. S-3073-I, Arizona Corporation Commission, Notice of Opportunity for Hearing [etc.], §13:-

As a result of the various ways "Lloyd's" was used, the Arizona Names reasonably understood that the Corporation of Lloyd's is a participant in all facets of the insurance business operating under the name "Lloyd's".

And see *Allen v Lloyd's of London*, (E.D. Va., Richmond Div. 1996) LEXIS 12300, *145 *et seq.*:-

In this case, sufficient indicia of interdependence between the players in the Lloyd's market has been established to make it reasonably likely that Names invested in the common entity of Lloyd's. ... [T]he "common enterprise" of Lloyd's is essential for Names to receive their paramount aim, a return on their investment. Names are attracted to Lloyd's because of its status and reputation. ... Lloyd's requires Names to "underwrite insurance at Lloyd's exclusively through one or more underwriting agents." ... Names depend on Managing Agents to select the risks underwritten through a syndicate, "set premium rates, receive premiums and pay claims to insureds on their behalf." ... And pursuant to the Lloyd's Bylaws, "The [managing] Agent undertakes to the Name that it will comply with the Lloyd's Acts 1871 to 1982 and with the requirements of the Council and will have regard to the codes of practice from time to time promulgated or made by the Council, which are applicable to it as a managing agent at Lloyds." ... Finally, the viability of the Lloyd's market ultimately depends on the success of the syndicates. ... Even if Names' participation in Lloyd's does not evidence the interdependence required by *Howey*, plaintiffs have shown a reasonable likelihood of proving that the syndicates in which Names' participate constitute "common enterprises." According to Lloyd's own document, "The market is based upon the principle of risk spreading: each risk is underwritten by a number of syndicates each supported by individual and/or corporate members. The strength of Lloyd's policies lies in the levels of security provided by the Society's capital base — the resources of its members." (Hudson Aff. II, Exh. D). As such, underwriting risks "gain utility . . . only when cultivated and developed as component parts of a larger area." n45 The evidence, thus, demonstrates that the common enterprise of either Lloyd's, the syndicates, or both was essential to Names' aim of obtaining profits, measured by the amount that premiums exceed claims and costs. ... [B]ecause reinsuring to close pre-1993 liabilities depends upon the centralization and common management of Equitas, and because the rebate of premiums to Names will be based on Equitas' aggregate surplus reserves, plaintiffs have shown a reasonable likelihood of success in proving that Equitas is a "common enterprise." ... Lloyd's contends that Equitas is not a common enterprise because Names will not share in its profits or losses. Lloyd's also points out that Names have no right to the assets of Equitas and that Names remain severally liable. These facts, even if true, do not prevent a finding that horizontal commonality exists.

And see for example *Lloyd's: Re-establishing the Franchise, Managing the Risks* (Moody's Investors Service, October 1997), p.5 ("The financial distress that forced Lloyd's to restructure also caused collateral damage to a critical component of the market's historic success — the perception of Lloyd's, amongst its customers, as a single business enterprise offering a uniformly high level of financial security"). But see (correctly) *Travelers Indemnity Co. v Booker*, 657 F Supp. 280, 282 (DDC 1987): "Contrary to the popular conception, Lloyd's is not a monolithic institution, nor does it operate in the same manner as a corporation in this country".

230 See for example *Liberty Transp., Inc. v Harry W. Gorst Co.*, 229 Cal. App. 3d 417, 437 (1991): "Appellants argue because the London based insurance companies were referred to as "London insurers" this created an improper inference appellants were associated with Lloyds of London and were therefore vastly more wealthy than respondent." And see *Harvey-Latham Real Estate v Underwriters At Lloyd's, London*, 574 So. 2d 13,15 (1990): "It is recognized by this Court that Lloyds of London is a corporate defendant of sizable wealth ...".

231 See for example J M. Sylvester and R. D. Anderson, *Is It Still Possible to Litigate against Lloyd's in Federal Court?*, 34 Tort & Ins. L. J 1065, 1068 (1999) ("The Lloyd's enterprise is not an insurance company, but instead a self-regulating entity ...").

times imperfectly analogised to, for example, the New York Stock Exchange²³² or a club²³³). At the time of R&R, self-regulators-at-Lloyd's repeatedly referred to the Lloyd's enterprise as a "going concern"²³⁴ without distinguishing between its component parts. Credit rating agencies presently rate the Lloyd's enterprise as if it were one entity. Prospective assureds-at-Lloyd's appear to have been similarly²³⁵ solicited,²³⁶ without disclaimer,²³⁷ using the familiar trademark "Lloyd's of London"²³⁸ and phrases such as "Lloyd's policy" and "Lloyd's policyholder";²³⁹

(4) they do not accurately reflect relevant self-regulatory provisions. For example, the representation that all relevant personal-use and dedicated common-use funds are part of one homogeneous, interavailable, undifferentiated fund does not survive superficial scrutiny.²⁴⁰ They do not always disclose or distinguish between the Old and the New Central Funds. Up to and including *Security at Lloyd's 2001*, including Corporation RA fye December 31, 2000,²⁴¹ those representations appear not to mention the Council's discretion over the Old Central Fund. The first express

²³² See for example *Bonny v Lloyd's*, 3 F.3d 156, 158 n.2 (7th Cir. 1993), *cert. denied* 114 S. Ct. 1057 (1994); *Roby v Lloyd's*, 996 F.2d 1353, 1357 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 385 (1993).

²³³ *Treasury Sel. Comm. 1*, §72 on self-regulatory quality at Lloyd's: "[P]art of the problem at Lloyd's was that a 20th century insurance market was still regulated and run upon the lines of a private club, in which difficulties were hushed up and solved behind closed doors."

²³⁴ See for example *SOD*, the Corporation's then CEO's July 30, 1996 cover letter, p.ii ("if the Society were still a going concern"); *SOD*, p.135 ("If the Reconstruction and Renewal plan were to fail, the Council would be required to reconsider whether the Society were still a going concern. If the going concern assumption were no longer valid, the Council would be obliged to put the Society into run-off").

²³⁵ See *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78, 78 (Bailhache J), quoting a promotional pamphlet issued by self-regulators-at-Lloyd's to prospective assureds-at-Lloyd's, which stated in part:-

"It has justly been said that Lloyd's has solved the problem of combining individual energy, enterprise and initiative with the collective security of a corporate body. From this you will realize that Lloyd's is the largest insurance institution in the world."

See recently Corporation press release LL07/00, January 26, 2000 ("Lloyd's launches first ever advertising campaign"):-

The oldest name in insurance, Lloyd's of London, this week launches its first ever above-the-line advertising campaign. The London-based insurance market has initiated a six month campaign of print advertisements in UK and US financial and trade press While Lloyd's has advertised sporadically in the past, this move marks the first ever planned campaign by the market. ... Lloyd's specialises in high-risk and commercial insurance such as aircraft, shipping, political and war risks, e-commerce risks and personal accident. It is also the UK's largest motor insurer.

Note erroneous "It" in the last sentence. The Corporation does not sell motor or any other sort of insurance.

²³⁶ See for example Lloyd's home insurance proposal form HIP(94):-

This is an application for insurance to be underwritten by certain Underwriters at Lloyd's of London. Lloyd's offers expertise: our tradition is to tailor and to innovate in order to meet our clients' needs. Lloyd's offers experience: virtually nothing is too large, too small, too complex, too simple or too new to cover Lloyd's offers security: 300 years of paying claims and a unique system of providing for future obligations makes the Lloyd's policy the safest that money can buy. Lloyd's Underwriters are leaders in the UK home insurance industry.

And see for example recent undated *Briefing Update* produced by the Corporation:-

Are you making a speech or presentation on Lloyd's? We may be able to help. Speaking opportunities at international / domestic conferences and other events provide an ideal platform to promote Lloyd's positively. Lloyd's marketing directorate can provide you with a full range of support including: Briefing notes and fact sheets Available on a range of topical issues. For further details please contact Timothy Yeardeley: 0171 327 6079[.] ... Help us to help you[.] [L]et us know when you accept a speaking engagement[.] Contact Joanna Spicer: 0171 327 6256[.]

²³⁷ Cf. the INEX's practice of including a disclaimer.

²³⁸ See for example *Financial Times*, September 4, 2000, *Reinsurance* supplement (advertisement for "Lloyd's"):-

123 underwriting syndicates operate at Lloyd's of London. Within these distinct units, specialist expertise and entrepreneurial flair combine to deliver rapid solutions tailored to business needs. Together, the syndicates form a dynamic market that is a major power in world insurance. 75% of FTSE 100 companies and 64% of those in the Fortune Global 500 buy insurance at Lloyd's.

²³⁹ See for example Byelaw 7 of 1998, Sch. 2, §4(1).

²⁴⁰ See for example the misleading characterisation at Corporation RA fye December 31, 1999, p.32 (also *ibid.*, fye 2000, p.32), which gives the misleading impression that all the claims payment securitisation funds there listed are not-dedicated common-use funds - *viz.*, that they are available to pay any and every claim. To the contrary, taking into account the permitted applications of each relevant fund, it appears that (for example) a £500m claim on a spoaistic corporate SYA participant with a total of £1m of personal-use funds might exceed the assets available at Lloyd's to pay it.

²⁴¹ See Corporation RA fye December 31, 2000, p.62 ("Lloyd's Central Fund"; no reference is made to the Council's discretion). Cf. for example Corporation RA fye December 31, 2001, p.57.

reference in those representations to that discretion appears to have been introduced in 2002: see for example *Chain of Security 2002*,²⁴² *Chain of Security (RA 2001) 2002*,²⁴³ and *Look into Lloyd's 2002*.²⁴⁴ As well as traditionally not mentioning the discretion where it purportedly is a condition of the Central Fund's availability, self-regulators'-at-Lloyd's representations are noteworthy for mentioning²⁴⁵ the discretion where it apparently does not exist in the first place, as with the New Central Fund Byelaw in relation to EquitasRe-reinsured liabilities;²⁴⁶

(5) they do not always mention other relevant funds. For example, the "chain of security" does not,²⁴⁷ for example, mention any dedicated common-use fund, or the Corporation's (other) personal assets. The "chain of security" at Lloyd's appears never to have been expostulated or demonstrated specifically and in detail by self-regulators-at-Lloyd's, and what explanation does exist appears to be materially incomplete;²⁴⁸

(6) they are not always consistent with each other. Insisting, in order to gain commercial advantage,²⁴⁹ on the existence and sufficiency of a "chain of security" of which the Central Fund is always a prominent part, they also alternately aver²⁵⁰ and deny²⁵¹ that the Lloyd's enterprise is liable to remedy SYA participants' defaults on insurance contracts;

²⁴² "Lloyd's operates a central fund that is available at the discretion of the Council of Lloyd's, to meet any portion of any claim that is not met from the first three sources. ... The Central Fund is available at the discretion of the Council of Lloyd's to meet any portion of any member's liabilities that they are unable to meet in full. ... The Central Fund is available, at the discretion of the Council of Lloyd's, in the event that a claim cannot be met from the premiums trust funds or members' assets."

²⁴³ Corporation RA fye December 31, 2001, p.57 ("as it is primarily a fund available for the protection of policyholders. However, the Central Fund financial statements describe how its assets may be used to cover members' solvency shortfalls. In the last resort, the Corporation's assets may also be used for this purpose at the discretion of Council.").

²⁴⁴ *Look into Lloyd's 2002*: "Lloyd's operates a central fund that is available (at the discretion of the Council of Lloyd's) to meet any portion of any claim that is not met from the first three sources."

²⁴⁵ See for example Corporation RA fye December 31, 2001, p.57; *Look into Lloyd's 2002*, etc.

²⁴⁶ See p.127.

²⁴⁷ Particularly at (for example) GR 1999, p.30.

²⁴⁸ The judge in *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J) thought that representations similar to self-regulators'-at-Lloyd's current "chain of security" etc. representations "might ... be calculated to mislead": *ibid.*, 83; see further p.160.

²⁴⁹ *Lloyd's v Clementson* {1} [1995] LRLR 307, 326 (Bingham MR):-

One may imagine a party in (say) New York considering whether to place a risk with (say) a corporate insurer in Frankfurt or with Lloyd's in London. The New York party will no doubt be influenced by many considerations in making his choice, among them the terms of the cover and the assurance of payment if the risk materialises. It seems reasonable to suppose that his decision may also be influenced by the level of premium payable. If it is possible that Lloyd's underwriters have been able to attract business by offering lower premiums, in effect gambling on the chance that a risk will not materialise, in knowledge that, if all else fails, the Central Fund will be used to indemnify the assured, then that would in my view make it arguable that the existence and mode of operation of the Central Fund have had the effect of distorting competition within the common market.

²⁵⁰ See for example *SOD*, p.123-124:-

The Society has a number of contingent liabilities in respect of risks under policies allocated to 1992 or prior years of account. If Equitas is unable to pay the 1992 and prior liabilities in full, the Society will be liable to meet any shortfall arising in respect of these policies. The New Central Fund Byelaw permits the application of the New Central Fund for these purposes.

Note the meaningless use of "Society". And see for example *Report on Regulation 1999* ("Our task is to see that ... the Society has sufficient resources to meet its obligations in full"; italics added). And see for example *Lloyd's v Clementson* {2} [1997] LRLR 175, 201 (Cresswell J; "The purpose of security is to protect policyholders. Lloyd's has frequently publicly explained its chain of security and referred to the role of the Central Fund in it").

²⁵¹ See for example *SOD*, p.115:-

If Equitas were to fail to implement proportionate cover, the Society would be required to consider whether it wished to make good any shortfall or replenish the regulatory deposits which may have been used to meet policyholder claims. This might require the use of the New Central Fund following the prior approval of the members in general meeting.

And see similarly *ibid.*, 151:-

[T]he assets of the New Central Fund will belong to the Society and, unless and until the Council applies the assets of the New Central Fund ..., no member, policyholder or other person has any interest of any kind in them. ... The New Central Fund may not be applied directly to meet 1992 and prior liabilities reinsured to close into Equitas ... or to provide financial support to Equitas unless the prior sanction of members of the Society in general meeting has been obtained.

(7) they do not distinguish between ephemera such as (for example) particular syndicates, SYAs, SYA participants, UYs, types of insurance product or outward reinsurers.

regulatory provisions; *Equitable Life v Hyman*

- 3.22 The Council purports²⁵² to exercise an absolute discretion over the Old Central Fund — the only one of the two Central Funds whose use to pay an EquitasRe-reinsured liability is not expressly prohibited in the first place — *viz.*, “where in the opinion of the Council it is expedient for the advancement and protection of the interests of the members of the Society in connection with the business carried on by them as [Members]”.²⁵³ No-one, including an assured-at-Lloyd’s, is entitled under the Old Central Fund Byelaw to any payment or account of the fund’s assets.²⁵⁴ The Council’s decision on the Old Central Fund’s disposition is final.²⁵⁵

provisions objectionable

- 3.23 The discretion is objectionable. For example:-

(1) there is statutory authority for it only if the Central Fund is considered part of the Corporation’s personal assets, in which case Lloyd’s Act 1911, s.7²⁵⁶ governs. Enacted in 1982 when the Central Fund was still subject to the May 18, 1927 Central Fund Agreement, the section does not mention the Central Fund (nor is the Central Fund mentioned elsewhere in Lloyd’s Acts 1871-1982);

(2) to the extent that the discretion is founded merely on the Council’s Lloyd’s Act 1982, s.6(2) power to make byelaws, it appears to be *ultra* the Council’s Lloyd’s Act 1982, s.6(1) and or (2) *vires*;²⁵⁷

(3) various²⁵⁸ first-principle arguments in favour of it being available, or in favour of the Council’s discretion being exercised, to pay EquitasRe-reinsured liabilities, appear to be available, particularly to the extent that the Lloyd’s enterprise purports to be solvent and conducts itself as a going concern. The most immediate argument is founded in self-regulators’-at-Lloyd’s public commitments to use the “Central Fund” to pay claims (as discussed below). A situation apparently multiply similar to that purportedly in relation to the Central Fund was considered recently

²⁵² See Old Central Fund Byelaw, §7 (“Application of the Central Fund”):-

Monies out of the Central Fund may be applied and the Central Fund may be charged for any of the following purposes: (a) making good any default by any member of the Society under any contract of insurance underwritten at Lloyd’s; (b) preventing the occurrence or reducing the extent of such default by any member of the Society; (c) compensating in whole or in part any person (including the Society) for making for or on behalf of any member of the Society any payment which has the effect of preventing or reducing such default by any such member; (d) extinguishing or reducing the liability of any member of the Society to any person whatsoever whether or not arising under a contract of insurance; (e) repaying monies previously borrowed for the purposes of this byelaw and paying interest, premium or other charges on such monies; (f) any other purpose; where in the opinion of the Council it is expedient for the advancement and protection of the interests of the members of the Society in connection with the business carried on by them as such members.

And see *ibid.*, §9:-

Council discretion in administration of Central Fund — (1) No policyholder or any other person shall have any right to payment from the Central Fund or to any account of the management, investment or application of the assets comprised in the Central Fund. (2) The decision of the Council on all matters as respects the Central Fund shall be final.

²⁵³ Old Central Fund Byelaw, §7. On “advancement and protection”, see Lloyd’s Act 1982, s.6(1).

²⁵⁴ Old Central Fund Byelaw, §9(1). See similarly New Central Fund Byelaw, §7(5).

²⁵⁵ Old Central Fund Byelaw, §9(2).

²⁵⁶ See p.140.

²⁵⁷ See p.130.

²⁵⁸ For example: (1) the Central Fund’s purpose is to pay claims; (2) self-regulators-at-Lloyd’s insistently and persistently represent and foster the belief that the Central Fund exists to pay claims 100%, presumably inducing the purchase of insurance at Lloyd’s; (3) external insurance regulation is predicated on it being so used (a discussion of external insurance regulation of the Central Fund is outside this Edition’s scope. See the discussion at *Astor’s Law of Lloyd’s*, 2nd Ed.); (4) it is an inherent part of the commercial context in which the assured-at-Lloyd’s does buy insurance specifically at Lloyd’s.

in *Equitable Life Assurance Society v Hyman*.²⁵⁹ Held, in relation to a bonus payable to an assured, that the bonus was an integral part²⁶⁰ of what the assured had contracted for and that Equitable Life did not have the absolute discretion to not pay it that its articles of association purported to confer.²⁶¹

in practice: personal-use-fund float use is automatic, not discretionary

- 3.24** Self-regulators at Lloyd's represent that the Central Fund is the last of four "links" in a "chain of security", in recognition that a SYA participant's personal-use funds may well be insufficient to pay all his own personal insurance contractual liabilities. That is to some extent correct but does not elucidate how the Central Fund is actually used. The Central Fund is not always used as a common-use fund. Rather, the Council habitually uses it — and it has long²⁶² been used — at the instance of a managing agency as a non-discretionary, automatic personal-use float to remedy 100% a relevant deficiency in a particular SYA participant's personal-use funds (a practice which has founded (unsuccessful) arguments of reckless selling and or rating²⁶³ and unfair competitive advantage²⁶⁴), which deficiency is usually precipitated by a managing agency's cash call on that SYA participant which need not (and usually does not) specify, and may not be attributable to, a particular claim. Indeed, the managing agency may have made the cash call in order to fund permitted managing agency expenses, not insurance transactions. To the extent that that particular deployment is not then reimbursed by the defaulting SYA participant, it loses its personal-use fund float character and retroactively and unavoidably becomes a common-use disbursement. The Council is unlikely to know in advance that the SYA participant will fail to make reimbursement and thus whether any automatic personal-use-fund deployment will become a common-use fund disbursement. It follows that ordinarily at Lloyd's, every deployment of the Central Fund as a common-use fund will generally, in retrospect, have been automatic, not discretionary.

²⁵⁹ [2000] 3 WLR 529 (HL).

²⁶⁰ See for example *Equitable Life Assurance Society v Hyman* [2000] 3 WLR 529, 539-540 (Lord Steyn; final bonuses from a life insurance company):-

[F]inal bonuses are not bounty. They are a significant part of the consideration for the premiums paid. And the directors' discretions as to the amount and distribution of bonuses are conferred for the benefit of policyholders. In this context the self-evident commercial object of the inclusion of guaranteed rates in the policy is to protect the policyholder against a fall in market annuity rates by ensuring that if the fall occurs he will be better off than he would have been with market rates. The choice is given to the G.A.R. [guaranteed annuity rate] policyholder and not to the Society. It cannot seriously be doubted that the provision for guaranteed annuity rates was a good selling point in the marketing by the Society of the G.A.R. policies. It is also obvious that it would have been a significant attraction for purchasers of G.A.R. policies. The Society points out that no special charge was made for the inclusion in the policy of G.A.R. provisions. So be it. This factor does not alter the reasonable expectations of the parties. The supposition of the parties must be presumed to be that the directors would not exercise their discretion in conflict with contractual rights. These are the circumstances in which the directors of the Society resolved upon a differential policy which was designed to deprive the relevant guarantees of any substantial value. In my judgment an implication precluding the use of the directors' discretion in this way is strictly necessary. The implication is essential to give effect to the reasonable expectations of the parties.

The above is arguably closely analogous to the Central Fund's role in selling insurance at Lloyd's, notwithstanding privity issues. Query the extent to which premiums at Lloyd's take into account the SYA participant's contribution to the Central Fund and to other common-use funds.

²⁶¹ See for example at [2000] 3 WLR 529, 539-540 (Lord Steyn); *ibid.*, 541-542 (Lord Cooke).

²⁶² See for example See *Cromer WP*, §64 (p.17) on the possibility of a new scheme for using the Central Fund as a first, rather than last, resort: "At present the Central Fund ... can be called upon, after the member has exhausted his deposits, reserves and his private means. The new arrangement might be regarded as bringing forward the Central Fund to be used before, instead of after, the private means of the member." Out of this idea, rejected by *Cromer WP* (*ibid.*, §65, p.17) evolved Central Fund earmarkings after reserves and the Lloyd's deposit had been exhausted.

²⁶³ Allegedly because the SYA participant's managing agency's active underwriter knew that the Council would always bail out the defaulting SYA participant however recklessly assumed the liabilities: see for example *Lloyd's v Clementson* {2} [1997] LRLR 175, 222, 224 *et seq.*, 239 *et seq.* (Cresswell J).

²⁶⁴ See for example *Lloyd's v Clementson* {2} [1997] LRLR 175, 225 *et seq.* (Cresswell J) and see *Lloyd's v Clementson* {1} [1995] LRLR 307 (Saville J and CA).

the New Central Fund: various byelaw impediments

summary

- 3.25 In relation to the New Central Fund,²⁶⁵ the New Central Fund Byelaw has been promulgated²⁶⁶ by the Council further to Lloyd's Act 1982, s.6(2), *ibid.*, Sch. 2, §(1) and (4), and Lloyd's Act 1911, ss.7 and 9. It allegedly replaces the Old Central Fund,²⁶⁷ but the Old Central Fund Byelaw does not appear to have been revoked and the Old Central Fund appears to subsist. The New Central Fund comprises underwriting Members' annual, callable and special contributions²⁶⁸ (if any); relevant money borrowed by the Corporation;²⁶⁹ reimbursement recoveries;²⁷⁰ other relevant recoveries;²⁷¹ any other fund accretions;²⁷² fund investments;²⁷³ and investment income.²⁷⁴ It is apparently insured.²⁷⁵ The New Central Fund is expressly capable of being applied to: (1) directly or indirectly extinguish or reduce any Member's (or former²⁷⁶ Member's) liability to any person arising out of or in connection with insurance business carried on by him at Lloyd's;²⁷⁷ (2) repaying money previously borrowed for the purposes of the New Central Fund Byelaw and paying interest, premium or other charges on that money;²⁷⁸ (3) repaying contributions made to the Central Fund under Old Central Fund Byelaw, §4(5) in accordance with New Central Fund Byelaw, §10;²⁷⁹ (4) any other purpose which may appear to the Council to further any of the Corporation's objects;²⁸⁰ (5) to discharge any obligation legally binding on the Corporation arising out of a relevant instrument executed at or before the New Central Fund Byelaw's effective date.²⁸¹

²⁶⁵ New Central Fund Byelaw, §2: "The Society shall establish, hold, manage and apply in accordance with the provisions of this byelaw a fund to be known as the New Central Fund."

²⁶⁶ See New Central Fund Byelaw, preamble.

²⁶⁷ New Central Fund Byelaw, Explanatory Note: "This byelaw provides for the establishment of a New Central Fund in succession to the Central Fund held under the Central Fund Byelaw (No. 4 of 1986)."

²⁶⁸ New Central Fund Byelaw, §3(a). On contributions, see *ibid.*, §4.

²⁶⁹ New Central Fund Byelaw, §3(b); on relevant borrowing by the Corporation, see *ibid.*, §6, which empowers the Corporation to borrow money at any time secured on the Corporation's assets.

²⁷⁰ New Central Fund Byelaw, §3(c); on relevant recoveries, see the detailed provisions at *ibid.*, §11.

²⁷¹ New Central Fund Byelaw, §3(d); *viz.*, funds recovered under *ibid.*, §12(1) and transferred to the New Central Fund under *ibid.*, §12(5).

²⁷² New Central Fund Byelaw, §3(e).

²⁷³ New Central Fund Byelaw, §3(f). On fund investing, see *ibid.*, §7.

²⁷⁴ New Central Fund Byelaw, §3(g).

²⁷⁵ Corporation RA December 31, 2001, p.74:-

The New Central Fund is supported by a five year insurance contract, which commenced in 1999, with six leading insurers whereby the insurers will meet unrecovered losses to the New Central Fund where it has been applied to meet members' cash calls, up to a ceiling of £350m per annum where such calls exceed £100m in any one year. The aggregate maximum payment over the lifetime of the policy is £500m. As at 31 December 2001 no claim had been made under this policy although a claim is expected to be made in 2002. Lloyd's New Central Fund paid premiums of £16.5m in 2001 (2000: £16.4m).

And see *NAIC Review 1999*:-

[p.17] Central Fund Insurance — In late April 1999, Lloyd's announced that it had arranged a layer of insurance to protect the Central Fund. The policy, which is effective for each of the next five years (1999 through 2003), has an annual attachment point of £100 million (\$166m), an annual limit of £350 million (\$582m) and an aggregate maximum limit over the five-year period of £500 million (\$830m). The coverage is provided by the six insurers listed below. Swiss Re - Employers Re — The St. Paul Companies — Hannover Re — XL Mid Ocean Re — Chubb Corp[.]. [p.49] The new Central Fund insurance has added a large extra layer of protection to the Central Fund, greatly strengthening the fund for at least the next five years.

²⁷⁶ New Central Fund Byelaw, §8(5).

²⁷⁷ New Central Fund Byelaw, §8(2)(a). Where Central Fund assets have been applied for that purpose, the beneficiary Member must refund it to the Corporation within 28 days of the latter's demand: *ibid.*, §11(1). The Council may at any time agree to reduce or waive the amount owed or demanded: *ibid.*, §11(2).

²⁷⁸ New Central Fund Byelaw, §8(2)(b).

²⁷⁹ New Central Fund Byelaw, §8(2)(c) read with *ibid.*, Sch. 1, definition of "Central Fund".

²⁸⁰ New Central Fund Byelaw, §8(2)(d).

²⁸¹ New Central Fund Byelaw, §8(4)(a). Per *ibid.*, §17, the New Central Fund Byelaw came into force immediately after the Council declared that all Equitas reinsurance contracts have become wholly unconditional in accordance with their terms. Presumably in relation to such liabilities, see for example *SOD*, p.123 ("[O]ngoing market" is colloquialism for "current

self-regulators'-at-Lloyd's representations

3.26 Self-regulators'-at-Lloyd's indications concerning the Central Fund's use to pay EquitasRe-reinsured liabilities can be summarised as follows:-

(1) to prospective RRC 1 Accepting Names: In *SOD*, self-regulators-at-Lloyd's warned prospective RRC 1 Accepting Names (*cf.* prospective EquitasRe-assureds-at-Lloyd's, to whom as a class neither self-regulators-at-Lloyd's nor any other regulator appears to have addressed any relevant communication) that the Central Fund would be both²⁸² liable and available to pay any shortfall in EquitasRe-reinsured liabilities not paid by Equitas Re, especially were Equitas Re to fail to meet a *continuing* Member's EquitasRe-reinsured liabilities and that Member's PTF or FAL were insufficient to meet 1993 and later liabilities and the Member defaulted on those liabilities,²⁸³ or were Equitas Re to fail to meet a *continuing* Member's EquitasRe-reinsured liabilities, earmarking to pass future solvency tests.²⁸⁴ Elsewhere in the same document, self-regulators-at-Lloyd's also represented that the New Central Fund would not²⁸⁵ be available to pay such claims, and that continuing Members would not be liable to make Central Fund contributions enabling the Central Fund to actually do so.²⁸⁶

(2) to actual EquitasRe-assureds-at-Lloyd's: in various public documents since R&R, including various "Security at Lloyd's" and "Chain of Security" brochures and Corporation annual reports, self-regulators-at-Lloyd's almost invariably represent²⁸⁷ to EquitasRe-assureds-at-Lloyd's that the Central Fund's availability is a certainty, not a matter of discretion, and draw no distinction between the New and the Old Central Funds, between EquitasRe- and other assureds-at-Lloyd's, between EquitasRe-reinsured and other relevant SYA participants, or otherwise in relation to types of insurance liability incurred at Lloyd's;

(3) generally: "One of our first priorities once reconstruction was achieved was to re-examine the way in which Lloyd's security should operate, against the background of the changing needs and perceptions of our clients world-wide. The result of this exercise was to reconfirm our commitment to the underpinning of Lloyd's policies through the Central Fund".²⁸⁸ And similarly: "The Society has a number of contingent liabilities in respect of risks under policies allocated to 1992 or prior years of account. If Equitas is unable to pay the 1992 and prior liabilities in full, the Society will be liable to meet *any* shortfall arising in respect of these policies. The New Central Fund Byelaw permits the application of the New Central Fund for these purposes".²⁸⁹ In reality, the New Central Fund Byelaw has always expressly *prohibited* the New Central Fund's use for the general purpose of paying an EquitasRe-reinsured liability.

SYA participants"): "Notwithstanding this 'firebreak' between 1992 and prior liabilities and the continuing market, it must be recognised that the ongoing market will indirectly remain exposed in a number of ways to 1992 and prior business reinsured by Equitas, including through the application of both overseas regulatory deposits and the New Central Fund."

²⁸² See for example *SOD*, p.123 ("If Equitas is unable to pay the 1992 and prior liabilities in full, the Society will be liable to meet any shortfall arising in respect of these policies. The New Central Fund Byelaw permits the application of the New Central Fund for this purpose" — in reality, the New Central Fund Byelaw has always prohibited such application.

²⁸³ *SOD*, p.132.

²⁸⁴ *SOD*, p.133.

²⁸⁵ See for example *SOD*, p.151 ("The New Central Fund may not be applied directly to meet 1992 and prior liabilities reinsured to close into Equitas [text omitted of exceptions not relevant to the present point] ..., or to provide financial support to Equitas unless the prior sanction of members of the Society in general meeting has been obtained.").

²⁸⁶ See for example *SOD*, p.152.

²⁸⁷ See p.118.

²⁸⁸ Corporation RA fye December 31, 1996, p.4 (Chairman's statement).

²⁸⁹ *SOD*, p.123-124. *Italics added.* *Cf.* for example the contemporaneous Market Bulletin Y266, June 14, 1996 ("New Central Fund Byelaw"), p.1 (*italics added*): "On 5 June 1996, the Council of Lloyd's passed the New Central Fund Byelaw, which serves two main purposes: ... to provide policyholder protection for all liabilities *other than* those reinsured into Equitas ...".

purported restrictions by the Council on the New Central Fund's use

3.27 While appearing to acknowledge the Lloyd's enterprise's liability for every EquitasRe-reinsured insurance contract, the Council, the body at Lloyd's responsible for protecting assureds-at-Lloyd's, does not expressly make available for that purpose either the Old²⁹⁰ or the New Central Fund. New Central Fund Byelaw, §8²⁹¹ governs the disposition of the New Central Fund, wherein the Council has purported to prohibit itself from exercising its function to deploy²⁹² the Central Fund to make any payment to any "Equitas" company except at arm's length terms in respect of property, assets, services or other benefits received;²⁹³ or "directly"²⁹⁴ for the purpose of extinguishing or reducing any liability of a [M]ember in respect of which Equitas Reinsurance Limited has, under an Equitas reinsurance contract, undertaken to reinsure and indemnify that member".²⁹⁵ Each self-prohibition is purportedly overridden by a contract binding on the Corporation co- or pre-dating the byelaw's effective date,²⁹⁶ or by Members' discretion expressed in Corporation general meeting.²⁹⁷ To discharge EquitasRe-reinsured liabilities, the Council pur-

290 See p.116.

291 New Central Fund Byelaw, §8 ("Application of Fund"):-

(1) Subject to sub-paragraph (3), moneys or other assets forming part of the Fund may be applied out of the Fund (including application by way of loan or on any other terms as to repayment) for any of the purposes specified in sub-paragraph (2).

(2) The purposes referred to in sub-paragraph (1) are: (a) directly or indirectly extinguishing or reducing any liability of a member to any person arising out of or in connection with insurance business carried on by that member at Lloyd's; (b) repaying moneys previously borrowed for the purposes of this byelaw and paying interest, premium or other charges on such moneys; (c) repaying contributions made to the Central Fund under paragraph 4(5) of the Central Fund Byelaw in accordance with paragraph 10 of this byelaw; (d) any other purpose (whether or not similar to any purpose mentioned in (a) to (c) above) which may appear to the Council to further any of the objects of the Society.

(3) Subject to sub-paragraph (4), no moneys or other assets shall be applied out of the Fund: (a) by way of payment (other than a payment on arm's length terms in respect of property, assets, services or other benefits) to any member of the Equitas group; or (b) directly for the purpose of extinguishing or reducing any liability of a member in respect of which Equitas Reinsurance Limited has, under an Equitas reinsurance contract, undertaken to reinsure and indemnify that member.

(4) Sub-paragraph (3) shall not preclude the Council from applying moneys or assets out of the Fund for any of the purposes mentioned in sub-paragraph (2): (a) in discharge of any legally binding obligation of the Society arising under a contract entered into or other instrument executed at or before the time at which this byelaw comes into force; or (b) in any other case, with the prior sanction of a resolution of the members of the Society in general meeting.

(5) In this paragraph, except sub-paragraph (4) (b), references to a "member" shall be taken to refer also to former members and to the estates of deceased members of the Society.

292 See p.127.

293 New Central Fund Byelaw, §8(3)(a) read with *ibid.*, Sch. 1, definition of "Equitas group".

294 [Depending on the construction of "directly", the provision, if valid, may prohibit the Council deploying the Central Fund as a float to infuse into a relevant dedicated common-use fund such as Lloyd's US Surplus-Lines Common-Use Trust Fund or Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund. There is no mechanism at Equitas Re for that company to call on the Council to deploy the Central Fund as a float to remedy Equitas Re's cash flow difficulties. For example, since Equitas Re manages no personal-use funds, no EquitasRe-reinsured SYA participant's personal-use funds can ever be the subject of a relevant shortfall which can be the subject of a Central Fund float. But there is nothing in principle stopping the Council advancing Central Fund money on condition that Equitas Re reimburses it, and nothing prevents Equitas Re reimbursing the Central Fund. The Central Fund is to that extent poised to be used as a common-use fund in relation to EquitasRe-reinsured liabilities.]

295 New Central Fund Byelaw, §8(3)(b) read with *ibid.*, Sch. 1, definition of "Equitas reinsurance contract".

296 New Central Fund Byelaw, §8(4)(a).

297 New Central Fund Byelaw, §8(4)(b), a rare recent example of Members' conscious effort being required to maintain the entire Lloyd's enterprise in good financial standing. On meeting procedure, see for example Membership, Central Fund and Subscriptions (Miscellaneous Provisions) Byelaw (No. 16 of 1993), §3. Each Member eligible to attend and vote (on which see *ibid.*, §3(2)) has one vote for each whole £100 of New Central Fund contribution which he will be liable to pay if the Council did exercise its contribution-levying powers in the manner proposed (*ibid.*, §3(7)). Resolutions are passed by simple majority (*ibid.*, §3(8)). On Corporation EGMs generally, see for example Annual and Extraordinary General Meetings Byelaw (No. 17 of 1996); Lloyd's Act 1982, Schedule 2, §(5). For apparently the only other instance in which Members' resolutions in Corporation EGM are binding on the Council, see Lloyd's Act 1982, s.6(4) (in practice, such self-regulatory measures as Members in Corporation EGM are statutorily empowered to overturn often appear too anodyne to attract or warrant the timeous concern of Members or their professional advisers). Corporation EGMs, of which there was a significant number between 1992 and 1996 on various self-regulatory actual and potential controversies, were not previously much used, apparently emboldening self-regulators-at-Lloyd's: see for example General Meeting of Members of Lloyd's, Wednesday 5th November 1986; Statement by Mr. Peter Miller, Chairman, p.1:-

ports to rely primarily on the assets of a mere outward reinsurer with which the Equitas enterprise disclaims²⁹⁸ a connection; *cf.* the conceptually similar PCW liabilities outwardly reinsured into Lioncover.

the prohibition objectionable

3.28 The Council's purported self-prohibition on using the New Central Fund to pay EquitasRe-insured liabilities appears to be objectionable.²⁹⁹ For example:-

(1) express *vires*: the Council is statutorily required to manage and superintend the Corporation's affairs, and regulate and direct the business of insurance at Lloyd's, in accordance with and subject to the provisions of Lloyd's Acts 1871 to 1982;³⁰⁰ and is statutorily empowered to make only such byelaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the Corporation's objects.³⁰¹ No provision in Lloyd's Acts 1871-1982 or in the Corporation's objects³⁰² is expressly or implicitly suggestive or permissive of not paying claims or of discriminating surreptitiously between categories of assured-at-Lloyd's, including by using a "new Central Fund" as a purported segregation device, *a fortiori* to the extent that the Old Central Fund is inadequate and available only discretionarily. As to the Corporation's first statutory object, the prohibition is inconsistent with the actual or aspirant carrying on by Members of the business of insurance of any description. As to the Corporation's second statutory object, while the provision may literally "protect" some Members, it appears to be inconsistent with the "advancement" of the interests of Members generally in connection with the business carried on by them at Lloyd's;

A General Meeting of course gives the membership an opportunity to put questions to the Council. I hasten to say that this is not an invitation to the membership at large to change the present practice whereby such questions are a rarity.

Cf. Walker CR, §1.12(g) (p.8):-

A combination of better disclosure and more pro-active regulation can do a great deal to protect names' interests; but in common with private investors who enjoy protection under the Financial Services Act, names should not have unrealistic expectations as to what regulation can deliver, and should always be critically alert to their own interests, and not merely when things go wrong.

And see for example *SOD*, p.115:-

If Equitas were to fail or implement proportionate cover, the Society would be required to consider whether it *wished* to make good any shortfall or replenish the regulatory deposits which may have been used to meet policyholder claims. This might require the use of the New Central Fund following the ... approval of the members in general meeting. If the New Central Fund is used for either of those purposes, any additional Central Fund levy will be imposed, subject to approval by vote, on all members of the Society for the relevant year of account in proportion to their underwriting capacity and will be weighted towards continuing Names with an exposure to any unpaid 1992 and prior liabilities.

And see for example *Captives Guidance Notes 1999*, Section D, §15.3 (p.37):-

Residual liability could arise ... if Equitas were unable to meet its liabilities in full. In such circumstances Lloyd's is ... required to consider whether it wishes to make good any shortfall to meet policyholders' claims. This might require the use of the New Central Fund following the prior approval of the members in general meeting.

"Residual liability" is not defined.

²⁹⁸ See p.5.

²⁹⁹ The Council's *vires* are set out at Lloyd's Act 1982, s.6:-

(1) The Council shall have the management and superintendence of the affairs of the Society and the power to regulate and direct the business of insurance at Lloyd's and it may lawfully exercise all the powers of the Society, but all powers so exercised by the Council shall be exercised by it in accordance with and subject to the provisions of Lloyd's Acts 1871 to 1982 and the byelaws made thereunder. (2) The Council may — (a) make such byelaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society, including such byelaws as it thinks fit for any or all of the purposes specified in Schedule 2 to this Act[.]

The Corporation's Lloyd's Act 1911, s.4 four objects are ([] and numbers therein editorially added):-

The objects of the Society shall be:— [1] The carrying on by Members of the Society of the business of insurance of every description including guarantee business; [2] The advancement and protection of the interests of Members of the Society in connection with the business carried on by them as Members of the Society and in respect of shipping and cargoes and freight and other insurable property or insurable interests or otherwise; [3] The collection publication and diffusion of intelligence and information; [4] The doing of all things incidental or conducive to the fulfilment of the objects of the Society.

³⁰⁰ Lloyd's Act 1982, s.6(1).

³⁰¹ Lloyd's Act 1982, s.6(2).

³⁰² See fn. 299.

(2) otherwise procedurally: the Council has no power to promulgate byelaws for an improper purpose. Not paying claims, and or not using the Central Fund to pay claims, appears to be such a purpose, *a fortiori* if pursued surreptitiously, without due process,³⁰³ and inconsistently with self-regulators'-at-Lloyd's continuing representations of superior securitisation, with Lloyd's enterprise's asseverations of solvency, and or with Members continuing to do business as usual. In promulgating the provision, the Council's overriding concern apparently was not to discharge in any genuine sense its self-regulatory securitisation duties in the interests of induced, expectant and reliant assureds-at-Lloyd's but to palliate the future financial incidents of corporate Membership specifically so that the Lloyd's enterprise could continue to do business as usual in relation to liabilities other than those EquitasRe-reinsured. Having entered into the incidents of Membership, financial self-preservation is each Member's responsibility, not the Council's;

(3) contravenes FSA Lloyd's Rulebook, §9.2.1: "The Society must manage its affairs, including the exercise of its bylaw-making powers, with due regard to the interests of policyholders and potential policyholders." and *ibid.*, §3.2.1: "The Society should seek to ensure that the Central Fund provides protection for policyholders at least equivalent to that available to other policyholders under the [FSA] [C]ompensation [S]cheme." That the FSA has materially misstated certain self-regulatory fundamentals — neither the Corporation nor Members in Corporation general meeting (the two traditional misconstructions of "Society") have any bylaw-making power; the Corporation and the Council are not synonymous — does not appear to derogate from the rule's substance.

the delegation of self-regulatory discretion to Members objectionable

3.29 The Council engineering by bylaw that Members in Corporation general meeting should assume the Council's power over the New Central Fund in relation to an³⁰⁴ EquitasRe-reinsured liability appears to be objectionable.³⁰⁵ For example, the Council has no power to delegate to Members:-

(1) any self-regulatory function, including the power to make byelaws. One of the Act's principal express³⁰⁶ purposes was to deprive Members in Corporation general meeting of their Lloyd's Act 1871, s.24³⁰⁷ bylaw-making power. Under the Lloyd's Act 1982 regime, Members have only two residual self-regulatory functions, *viz.*, under *ibid.*, s.6(4)) in respect of an uncongenial bylaw already passed, and under *ibid.*, s.3³⁰⁸ to elect members of the Council. The Council's

³⁰³ See p.157.

³⁰⁴ New Central Fund Bylaw, §8 is not clear on the procedure: would a Corporation general meeting be requisitioned by Members or summoned by the Council; would it relate to EquitasRe-reinsured liabilities particularly or generally; etc.

³⁰⁵ On which see for example *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176 (Q.B. Div. Ct.) (the Council not judicially reviewable). *Cf. R v Lloyd's Regulatory Board ex parte Macmillan and Thompson* [1995] LRLR 485, 486 (Macpherson of Cluny J). And *cf.* for example *Moran v Lloyd's* [1983] 1 QB 542; [1983] 1 Lloyd's Rep. 51 (Lloyd J); *ibid.* [1981] 1 Lloyd's Rep. 423 (CA).

³⁰⁶ See for example Lloyd's Act 1982, recitals:-

... (3) By the said [Lloyd's] Act of 1871 the members of the Society in general meeting were empowered to make byelaws for the purposes provided in that Act and generally for the better execution of the Act and the furtherance of the objects of the Society, and byelaws have from time to time been so made: ... (5) Since 1968 the number of persons resident outside the United Kingdom admitted as members of the Society and the total number of members of the Society have both greatly increased so that it is no longer practical or expedient for the members of the Society to exercise in general meeting the powers reserved to them, by the Acts hereinbefore mentioned: (6) It is expedient in order to enable the Society to regulate the management of its affairs in accordance with both present-day requirements and practice and the interests of Lloyd's policyholders that — (a) there should be established a Council of Lloyd's to have control over the management and regulation of the affairs of the Society; (b) the said Council should have power to make byelaws for the purposes of such management and regulation, including byelaws making provision for and regulating the admission, suspension and disciplining of members of the Society, Lloyd's brokers, underwriting agents and others; and (c) certain provisions in Lloyd's Acts 1871 to 1951 should be amended or repealed: ...

³⁰⁷ Repealed by Lloyd's Act 1982, s.15(1)(a) and *ibid.*, Sch 3.

³⁰⁸ Lloyd's Act 1982, s.3 provides (so far as presently relevant):-

self-regulatory functions are governed by Lloyd's Act 1982, s.6, which confers general self-regulatory functions (s.6(1)³⁰⁹), exclusive byelaw-making powers (s.6(2)³¹⁰), imposes the obligation to adopt byelaws only by Council special resolution³¹¹ (s.6(3)³¹²), and empowers the Council to delegate (s.6(5)³¹³ and s.6(6)³¹⁴). The Act is express, specific and definitive when conferring substantive obligations³¹⁵ or powers³¹⁶ on the Council. The Act appears to be particularly specific when conferring powers of delegation;³¹⁷

... (2) Subject to subsection (3) below, the members of the Council shall be — (a) sixteen working members of the Council elected from among the working members of the Society by those members of the Society whose names are shown on Part I of the Register referred to in Schedule I to this Act as working members of the Society; (b) eight external members of the Council elected from among the external members of the Society by those members of the Society whose names are shown on Part II of such Register as external members of the Society; (c) three nominated members of the Council appointed by the Council by special resolution, whose appointments shall not take effect unless and until confirmed by the Governor for the time being of the Bank of England: Provided that a person who is a member of the Society or an annual subscriber or an associate shall not be eligible for appointment as a nominated member of the Council. ... (3) The Council may by byelaw increase or decrease the number of its members and specify the manner in which such increase or decrease may be effected: Provided that the number of places available to working members of the Society at any election to the Council shall be such that if filled by such members not more than two-thirds of the members of the Council would be working members of the Council.

³⁰⁹ Lloyd's Act 1982, s.6(1): "The Council shall have the management and superintendence of the affairs of the Society and the power to regulate and direct the business of insurance at Lloyd's and it may lawfully exercise all the powers of the Society, but all powers so exercised by the Council shall be exercised by it in accordance with and subject to the provisions of Lloyd's Acts 1871 to 1982 and the byelaws made thereunder."

³¹⁰ Lloyd's Act 1982, s.6(2):-
The Council may — (a) make such byelaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society, including such byelaws as it thinks fit for any or all of the purposes specified in Schedule 2 to this Act; and (b) amend or revoke any byelaw made or deemed to have been made hereunder.

³¹¹ Per Lloyd's Act 1982, s.2(1), "special resolution" means "a resolution of the Council passed by separate majorities of both — (a) all the working members of the Council for the time being; and (b) all the members for the time being of the Council who are not working members of the Council as aforesaid, that is to say, the external members of the Council and the nominated members of the Council[.]"

³¹² Lloyd's Act 1982, s.6(3): "Any byelaw made under this Act and any amendment or revocation of any byelaw so made or deemed to have been so made shall be made by special resolution."

³¹³ Lloyd's Act 1982, s.6(5):-
(5) Subject to subsections (6) and (10) of this section, the Council may, by special resolution, delegate the exercise of such of its powers or functions under this Act as are not required to be exercised by special resolution to any one or more of the following, that is to say:- (a) the Chairman of Lloyd's; (b) a Deputy Chairman of Lloyd's; (c) the Committee; (d) the Chairman of the Committee; (e) a Deputy Chairman of the Committee.

³¹⁴ Lloyd's Act 1982, s.6(6):-
The Council may, by special resolution, delegate — (a) to the Committee but not otherwise — (i) the making of regulations regarding the business of insurance at Lloyd's; and (ii) the carrying out or exercise of any duties, responsibilities, rights, powers or discretions imposed or conferred upon the Council by any enactment (other than an enactment in this Act) or regulation made in pursuance thereof or by any other instrument having the effect of law or by any other document or arrangement whatsoever, whether or not such enactment, regulation, instrument, document or arrangement shall be in force or in existence on the day when this Act comes into force, in so far as such delegation is not prohibited by any enactment, regulation, instrument, document or arrangement. (b) to the Committee or to the Chairman of the Committee or to a Deputy Chairman of the Committee but not otherwise the giving of directions regarding the business of insurance at Lloyd's to any member of the Society, Lloyd's broker, underwriting agent, director or partner of a Lloyd's broker or underwriting agent or person who works for a Lloyd's broker or underwriting agent in such capacity as may be specified by the Council (whether or not the acts required to be done or not done by such direction are already required to be done or not done by the provisions of Lloyd's Acts 1871 to 1982, or of byelaws made thereunder, or of such regulations as are referred to in paragraph (a)(i) above).

³¹⁵ See for example Lloyd's Act 1982, ss.3(5), 4, 6(4)(a), (d), 7(1), 9, 10(1), 10(3), 11(1); *ibid.*, Sch. 1, §§1, 2, 3.

³¹⁶ See for example Lloyd's Act 1982, ss.3(3), 3(4), 3(4)(b), 6(2), 6(4)(a), 6(5), 6(6), 6(8)(a), 8(3), 10(4), 11(5), 12(1)(e); *ibid.*, Sch. 1, §1; *ibid.*, Sch. 2.

³¹⁷ See for example Lloyd's Act 1982, s.6(5) ("Subject to subsections (6) and (10) of this section, the Council may, *by special resolution*, delegate ..."); *ibid.*, s.6(6) ("The Council may, by special resolution, delegate — (a) to the Committee *but not otherwise* ... (b) to the Committee or to the Chairman of the Committee or to a Deputy Chairman of the Committee *but not otherwise*") (italics added).

(2) its particular³¹⁸ inescapable and unalterable self-regulatory duty — into which it would be inappropriate to permit the unregulated financial motives, convenience or munificence of Members to intrude³¹⁹ — of securitising claims and, by extension, no power to permit Members to surreptitiously create an underclass of assured-at-Lloyd's, or otherwise to sanction or facilitate the Council's improper abrogation of its self-regulatory securitisation functions. Given that not paying a claim appears to be inconsistent with each of the Corporation's first two statutory objects, there appears to be nothing of a genuinely self-regulatory nature capable of being properly debated in Corporation general meeting in the first place.

the New Central Fund: Members' contributions
generally

- 3.30 The Central Fund is largely constituted of annual compulsory contributions made to it over calendar years by Members. Members are said by self-regulators-at-Lloyd's to be "linked together"³²⁰ by a "single security",³²¹ which, in the absence of any other source of money, can be as good only as their collective willingness to make those contributions, which are inalienable for as long as SYA participants continue to do business as usual: "The more than the individual name is relieved of his unlimited liability, the more it *must* fall on his fellow names."³²² It is the Council's self-regulatory responsibility — *per* the FSA Lloyd's Rulebook³²³ and on general principles³²⁴ — to ensure that the Central Fund is available and sufficient for the purpose of paying every claim on every insurance contract sold at Lloyd's to the extent not met by other funds. If Members are unwilling to fund liabilities at Lloyd's, the proper course is for the Lloyd's enterprise to shut down.³²⁵ The Council's deployment of the Central Fund as a common-use fund has

³¹⁸ Indeed, the reconfiguring of the Central Fund's availability as a byelaw moderated by Members in Corporation general meeting is inconsistent with the May 18, 1927 Central Fund Agreement, a contract of adhesion current when Lloyd's Act 1982 was passed, which fact possibly explains the otherwise curious absence of any reference in Lloyd's Acts 1871-1982 to the Central Fund.

³¹⁹ Presumably the decision of Members in Corporation general meeting is not a foregone conclusion. No Member is seised with any statutory self-regulatory obligation or responsibility prescribing or indicating the basis on which he should make his decision. Presumably the substantial corporate Member — whether or not a beneficiary of Council undertakings to spare it from particular Central Fund levies — will wish to consider the benefits and detriments of preserving or ensuring the collapse of the Lloyd's enterprise, a calculation presumably dependent on (among other things) the apparent current insurance profitability cycle. One of four resolutions tabled (at the instance of an action group called the EGM Initiative) at the Corporation's July 27, 1992 EGM proposed:-

We request the Council immediately to rescind the Council resolution made on or about June 3, 1992 imposing a 1.66% levy on Names, to deliver to all Names within 4 weeks a full, frank written report particularising the capital base of the Lloyd's insurance market and its present and future capital requirements, and to investigate the fairest way of meeting those requirements from the Lloyd's community as it will be as at January 1, 1993.

The EGM postal ballot vote, announced August 28, 1992, was 8,160 Members in favour and 14,614 against. In written material published before the vote, self-regulators-at-Lloyd's recommended that Members vote against it.

³²⁰ See for example *Reg. Plan 1999*, p.8.

³²¹ RA 1996, p.4 (Chairman's statement):-

A commitment to single security carries with it the inescapable obligation to review the system that underpins it and ensure that it is both robust and fair to all members who, by continuing or joining, have agreed to the mutual support provided by the Central Fund mechanism.

³²² *Cromer WP*, §59 (p.16):-

No one has suggested that, under limited liability, a member should be left on his own and that default on a Lloyd's policy would be regarded as a possibility, however remote. If that is so, there must be an unlimited liability somewhere and in practice that could only be placed on the shoulders of the members of Lloyd's as a whole. The more than the individual name is relieved of his unlimited liability, the more it must fall on his fellow names. Of course deposits can be increased and reserve funds built up, but if Lloyd's remain determined to ensure that all Lloyd's policies are honoured, then the limited liability of a name must mean that other names will have to come to his assistance before he has exhausted his private means. If default happened only in isolated cases, this might not be a serious burden on the general body of names - but, if the whole of a market becomes unprofitable or the less efficient syndicates lost money through the markets, it is not obvious that the remainder of the names would be willing to pay out what might be substantial sums.

³²³ See p.143.

³²⁴ See p.146 *et seq.*

³²⁵ See for example *SOD*, the Corporation's then CEO's July 30, 1996 cover letter, p.ii:-

traditionally been moderated (as, at SYA level, is traditional conventional RTC) by a steady influx of pliant new Members. Lloyd's Act 1982, s.8(1) says nothing about, and therefore does not prohibit, Members' or SYA participants' severalised contributions to any number of common-use trust and other funds, especially the Central Fund. Contribution to the Central Fund is not an obligation owed to or enforceable by any assured-at-Lloyd's, or even, apparently, by any external insurance regulator as presently empowered. Such contribution is a back-office matter between Members and self-regulators-at-Lloyd's, for the latter to require (if political circumstances permit) by contract. A contribution once made loses all connection with the contributor: it is to no extent a contributor's own personal reserve. There is no sanction on any Member for voting at a Corporation EGM not to contribute to the Central Fund, or for otherwise being party to rendering it insufficient and thus to the Lloyd's enterprise having to cease trading. Corporation EGMs have become a fashionable political and self-regulatory³²⁶ device for Members to debate the merits of such matters.

the Council's obligations and powers

- 3.31** The extent of the Council's legal obligation to ensure a sufficient Central Fund is unclear. Presumably it has no power to run down the Lloyd's enterprise surreptitiously.³²⁷ There appears to be no case on the point; while in the FSA Lloyd's Rulebook, the FSA merely expresses a wish.³²⁸ The Council has empowered itself, probably properly,³²⁹ to require³³⁰ underwriting Members to make severalised³³¹ annual contributions to the Central Fund. Mechanisms already in place at Lloyd's generally prevent the underwriting Member from defaulting on his annual ordinary Central Fund contribution. The Court of Appeal has indicated that though a mere whiff of mutualisation in isolation is not necessarily objectionable,³³² there may be limits to self-regulators'-at-Lloyd's power to require Members to fund the Central Fund and or mutualise SYA participants' liabilities,³³³ an indication which appears to be based on a misunderstanding of the Central

Alongside this return to profitability, the Society must face the magnitude of the losses which many Names have incurred on the 1992 and prior years of account. In comparison with the Equitas premium (calculated as at 31 December 1995) of £14.7 billion, syndicate assets (excluding Names' debt) available to meet these liabilities as at 31 December 1995 were £9.9 billion. A significant part of the balance is believed to be irrecoverable from the many Names who have incurred significant losses. To date, the Society has been able to deal with the non-payment of members' obligations through the application of the Central Fund. As at 30 June 1996, the Central Fund's net assets (excluding amounts owed by members) stood at approximately £505 million. In the absence of the successful implementation of the reconstruction plan, the Central Fund might not be able to meet the anticipated cash requirements arising out of members' shortfalls and the Society would be unlikely to meet the DTI's members' level solvency test. If the reconstruction plan were to fail, the Council would be required to reconsider whether the Society were still a going concern. If the going concern assumption were no longer valid, the Council would be obliged to put the Society into run-off with consequent damage to members.

³²⁶ There were various Corporation EGMs before September 3, 1996 on R&R matters, the Council acceding to the (favourable) resolutions passed.

³²⁷ See p.157.

³²⁸ See p.143.

³²⁹ Lloyd's Act 1982, Sch. 2 does not provide for a byelaw concerning mutualisation in general, or the Central Fund in particular. The nearest provision is Lloyd's Act 1982, Schedule 2(38) — although Old Central Fund Byelaw's and New Central Fund Byelaw's official Explanatory Notes invokes *op. cit.*, §(1) and (4) — which empowers the Council to make byelaws for "providing for the establishment and maintenance of a scheme for the protection of Lloyd's policyholders, underwriting members and others in the event of the default of a Lloyd's broker and for empowering the Council to require Lloyd's brokers and others to be parties to and to contribute to such scheme as a condition or requirement of the grant or renewal of permission to broke insurance business at Lloyd's as a Lloyd's broker or otherwise" (italics added). See generally *Lloyd's v Clementson* {1} [1995] LRLR 307, 309 (Saville J).

³³⁰ See generally Old Central Fund Byelaw, §4; New Central Fund Byelaw, §4.

³³¹ The Council may promulgate only such byelaws as are consistent with (among other provisions) Lloyd's Act 1982, s.8(1): *ibid.*, s.6(2). The severalised contributions are consistent with *ibid.*, s.8(1). It is believed that every relevant Rulebook at Lloyd's provision requiring a common-use fund contribution prescribes a several-liability contribution. For litigation apparently based on misconstruction of s.8(1), see for example *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398 (CA).

³³² *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402 (CA).

³³³ See *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402 (CA). Per *ibid.*, one objection appears to be connected with whether a measure's "principal purpose" is to effect mutualisation. And see *R v Lloyd's ex parte Johnson* (unreported, August 16, 1996). The court may have meant that a Member cannot be made liable in excess of his proportionate participation on a particular SYA, but that is a different point.

Fund's purpose³³⁴ and the severalised nature of Central Fund contributions. The Council has formally disempowered³³⁵ itself, probably improperly, from requiring certain contributions to the New Central Fund.

Members' contributions to the New Central Fund

- 3.32 Concerning the New Central Fund,³³⁶ every underwriting Member is liable to make up to three types of contribution: (1) an annual contribution;³³⁷ (2) additionally,³³⁸ a "callable contribution", viz., one or more extraordinary contributions not exceeding, in total, a specified amount.³³⁹ The callable contribution from all relevant underwriting Members is not to exceed £200m³⁴⁰ in any calendar year or "such other sum as the Council may by special resolution determine";³⁴¹ (3) additionally if it "appears requisite or expedient" to the Council, a "special contribution".³⁴² The New Central Fund Byelaw provides for refunding contributions.³⁴³ As part of R&R, the Council required Members to make an extraordinary refundable £384.242m Central Fund contribution³⁴⁴ which the Corporation contractually agreed to repay over time. The amount of each of the annual and special contribution, and the due dates, are as prescribed by the Council.³⁴⁵ Due payment of any of the three types of New Central Fund contribution is a condition of being permitted to sell insurance at Lloyd's.³⁴⁶ The defect in the arrangement is that EquitasRe-reinsured liabilities remain the responsibility of the Lloyd's enterprise.

334 See *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402 (CA). Per *ibid.*, one objection appears to be connected with whether a measure's "principal purpose" is to effect mutualisation. And see *R v Lloyd's ex parte Johnson* (unreported, August 16, 1996). The court may have meant that a Member cannot be made liable in excess of his proportionate participation on a particular SYA, but this is an entirely different point.

335 See p.136.

336 On the financing of the New Central Fund, see generally *SOD*, p.152 ([] and numbers therein added):-

The resources of the New Central Fund will be of two kinds: paid-in funds which are immediately available and reserve funds which are available to be called from members of the Society as and when required. Paid-in funds The paid-in funds of the New Central Fund will consist initially of at least E 100 million which, on the settlement offer becoming unconditional, will be paid into the New Central Fund from the existing Central Fund. For each year of account thereafter, the paid-in funds will be increased by annual contributions payable by members at a level judged by the Council to be required by the circumstances then prevailing, but subject to the following: [1] members who contributed to the members' special Central Fund contributions to the existing Central Fund in respect of the 1993, 1994 and 1995 years of account may have those contributions refunded as described in Chapter 4; and [2] the limitations imposed by the undertakings given by the Council in relation to the existing Central Fund are to continue to apply in relation to the New Central Fund. Broadly, in relation to 1997 and later years, the Council will be required to announce the proposed level of each year's paid-in contributions by 30 September of the previous year and will not be able subsequently to increase the level of contributions above those announced without the approval of a meeting of the members who are liable to pay.

Reserve funds The reserve funds of the New Central Fund will take the form of 'callable contributions' which members will be liable to pay only if called upon to do so. The aggregate amount of callable contributions in respect of any one calendar year will be fixed each year at a figure announced in advance by the Council. Until the Council decides otherwise, this figure will be 1200 million. The figure will be a fixed amount, which will be apportioned among the members underwriting for a particular year in proportion to their allocated premium limits for the corresponding year of account. The New Central Fund Byelaw provides that the undertakings given by the Council in relation to the existing Central Fund and referred to above will apply to the callable contributions so as to require that the aggregate amount of callable contributions is announced by 30 September of the previous year.

337 See generally New Central Fund Byelaw, §4(1)(a).

338 Query if there are inherent limitations on the Council's power to make extraordinary levies: see for example *Hole v Garnsey* [1930] AC 472, 501 (Lord Tomlin); the case was considered in *Napier & Ettrick v RF. Kershaw Ltd., Lloyd's v Woodard and Wilson* [1997] LRLR 1 (a case on the scope of the PTD, §2(a)(i)).

339 New Central Fund Byelaw, §4(1)(b).

340 Discussed at *Kent RC*, §2. 29 (p.15).

341 New Central Fund Byelaw, §4(4).

342 New Central Fund Byelaw, §4(2).

343 See New Central Fund Byelaw, §10 and *ibid.*, Sch. 2.

344 See generally Corporation RA fye December 31, 1996, p.46; p.49 (Lloyd's Central Fund general fund account); p.56 (Lloyd's Central Fund notes to the financial statements, note 7).

345 New Central Fund Byelaw, §4(3); see repetitiously re special contributions *ibid.*, 4(2).

346 New Central Fund Byelaw, §4(9). The Council has empowered itself to require a Member to execute a written undertaking to the Corporation to duly pay a contribution: *ibid.*, §5(1). That undertaking may stipulate for such payment to be free of set-off, counterclaim or other deduction: *ibid.*, §5(2).

express limitations on levies

- 3.33 The Council has purported to do a variety of things in relation to Central Fund contributions, including (for example): (1) to empower³⁴⁷ itself — apparently in a political gesture devoid of self-regulatory quality — to exempt Members either individually or by class from making contributions to the New Central Fund; (2) to prevent³⁴⁸ itself from levying annual, callable and special contributions in a “manner” inconsistent with any undertaking given to an otherwise liable Member under the Membership, Central Fund and Subscriptions (Miscellaneous Provisions) Byelaw (No. 16 of 1993) for the time being in force; (3) to empower³⁴⁹ itself to enter into agreements with, and give undertakings to, actual or prospective Members limiting their Central Fund and or New Central Fund contributions and Corporation entrance fees and annual subscriptions. Such gestures appear designed to attract and retain a new generation of underwriting Member, not to ensure the Central Fund’s sufficiency.

objections

- 3.34 The Council conferring various privileges in relation to the self-regulatory bedrock of the Lloyd’s enterprise appears to be objectionable (as it seems to have recognised³⁵⁰). The Council

³⁴⁷ New Central Fund Byelaw, §4(5). See the further provisions at *ibid.*, §4(6).

³⁴⁸ New Central Fund Byelaw, §4(7):-

The Council shall not levy any annual contribution, callable contribution or special contribution on a member in a manner inconsistent with an undertaking given to that member under the Membership, Central Fund and Subscriptions (Miscellaneous Provisions) Byelaw (No. 16 of 1993, 514) which is for the time being in force; and for the purposes of this paragraph and of that byelaw any undertaking given to a member before this byelaw comes into force and relating to the exercise of powers of the Council under the Central Fund Byelaw shall be construed as if: (a) any reference in that undertaking to the exercise of powers of the Council under the Central Fund Byelaw included a reference to the exercise of powers of the Council under this byelaw; (b) subject to (c) below, any reference to contributions to the Central Fund included a reference to contributions to the Fund under any provision of this paragraph 4; (c) any reference to an undertaking by the Council to announce in advance the level of any such contribution for a year, in so far as it relates to callable contributions, were a reference to an undertaking to announce the sum applicable in respect of that year for the purposes of sub-paragraph (4) of this paragraph (being £200,000,000 or such other sum as the Council may determine in accordance with that sub-paragraph) and not the level of any individual callable contribution; (d) any reference to an undertaking by the Council that the level of any contribution will not exceed a level so announced, in so far as it relates to callable contributions, were a reference to an undertaking that the aggregate amount of the callable contributions of all members will not exceed the sum so announced.

And see *ibid.*, §15. *Ibid.*, §15(2):-

The Council may in any manner referred to in paragraph 13 of the Reconstruction and Renewal Byelaw (No. 22 of 1995, 519), or in any other case where it appears to the Council to be expedient to do so for the furtherance of the objects of the Society, give undertakings to any person (whether or not a member of the Society) with respect to the exercise of any of the powers of the Council under this byelaw to raise money for the Fund and to apply money out of the Fund.

Recovery by self-regulators-at-Lloyd’s of a Central Fund contribution levied in good faith breach of an undertaking would presumably give rise, in principle, to damages in the ordinary way. Lloyd’s Act 1982, s.14(3) appears to exempt relevant components of the Lloyd’s enterprise from having to pay damages in such event unless the Member can show bad faith by the Council, a dynamic in which the Member is presumably complicitous given the obviously not-self-regulatory nature of relevant measures and undertakings: query if any Member could properly argue that an undertaking to him exempting him from having to pay a relevant Central Fund levy was genuinely consistent with the nature of the Lloyd’s enterprise and the Council’s obvious self-regulatory responsibilities. For eloquent expression of the illogicality of protecting the Member from a Central Fund extraordinary levy necessary to save the enterprise, see *Captives Guide*, p.1: “All members contribute to the [New Central Fund] but there are safeguards in place to protect members in the unlikely event that an exceptional loss requires Lloyd’s to call for contributions beyond the specified levels.”

³⁴⁹ See generally Byelaw 16 of 1993, especially *ibid.*, §2. The byelaw expressly contemplates the Council (for example — for the full list, see Byelaw 16 of 1993, §2(2)(a)-(f)): (1) agreeing to exempt the Member from Central Fund contributions and Corporation entrance fees and annual subscriptions (*ibid.*, §2(2)(a). This sort of agreement requires the Council’s special resolution: *ibid.*, §2(3). The special resolution may be general or particular: *ibid.*, §2(4)); (2) undertaking to a Member not to exercise relevant Central Fund and New Central Fund contribution-raising powers, and Corporation annual subscription-raising powers (either generally or as stipulated in the undertaking) unless some specified event has first happened or some specified condition has been satisfied (*ibid.*, §2(2)(b). This sort of agreement requires the Council’s special resolution: *ibid.*, §2(3). And see *ibid.*, §3 (meeting of the relevant class of Members may be held, and confined to Members standing to benefit from the undertaking)); (3) undertaking to notify the Member of the proposed level of any Central Fund, New Central Fund or Corporation contribution or annual subscription for any year and that such contribution or annual subscription will not exceed the level referred to in the notice (except as may be specified) (*ibid.*, §2(2)(c)); (4) undertaking to the Member that a Central Fund or New Central Fund contribution or Corporation subscription will be determined or calculated on a specified basis (*ibid.*, §2(2)(d)). The byelaw expressly contemplates the Member undertaking to pay his contributions or subscriptions in the specified manner and amount (*ibid.*, §2(2)(f)).

³⁵⁰ See for example *SOD*, p.135:-

has no power to deliberately or neglectfully so configure its own assets as to render itself unable to discharge any of its insurance liabilities in full. The Council must actually collect contributions necessary to fund it fully and has no power to prevent itself from doing so. The Council does not have the power or any responsibility to protect the Member from a fundamental incident of Membership, *viz.*, enabling the Central Fund to provide 100% recourse to every assured-at-Lloyd's. The Central Fund must be funded according to need, not expediency, however desirable commercially and strategically in the quest to recruit Members. Arguably the proper course where the Council does not wish to discharge its self-regulatory responsibilities, or Members their financial responsibilities, is for its members to resign *en masse*; and or for the Lloyd's enterprise to stop trading and run off its liabilities with full notice to existing assureds-at-Lloyd's.

the Corporation's (other) personal assets: the Council's statutory discretion orientation

- 3.35 Confusion and error are endemic concerning the Corporation, especially its true nature and appellation, and what it does.³⁵¹ By 1870, it was expedient³⁵² to the “committee for managing the affairs of Lloyd's”³⁵³ to ask Parliament to create a new, distinct, independent legal person³⁵⁴ separate from both the members of that committee and subscribers to the alleged 1811 deed of association. Lloyd's Act 1871, s.3,³⁵⁵ bought and paid for by those subscribers, created — not without material debate in both Houses³⁵⁶ — one³⁵⁷ new legal person, for various purposes including contracting,³⁵⁸ litigation,³⁵⁹ debt recovery,³⁶⁰ property vesting,³⁶¹ and trusteeship.³⁶²

The Central Fund underpins the operation of the Lloyd's market, enabling policyholder claims to be met *in full* as they fall due and allowing participants in the market to conduct their affairs on the assumption that the market as a whole will continue to operate as a going concern. If the Council were to conclude that the Central Fund was no longer available to meet members' liabilities as they fell due, the Society would cease to be a going concern and would have to face the run-off alternative. ... [S]ome or all of the consequences set out below would follow: subject to any powers of intervention by the DTI, the powers and responsibilities of Lloyd's and the Council as regulator would remain in place and the interests of creditors of the Society and policyholders would become paramount and would override the Council's duties to members[.]

351 See the chapter on the Corporation at *Astor's Law of Lloyd's*, 2nd Ed.

352 Lloyd's Act 1871, recital [3]:-

[T]he affairs of the Society, and the business conducted by its members as such, are of large and increasing magnitude and importance, but the constitution of the Society is imperfect, and difficulties arise therefrom in relation to legal proceedings, and the management of the affairs of the Society and the incorporation of its members with proper powers would be of great benefit to the shipping and mercantile interests of the United Kingdom, and it is therefore expedient that they be incorporated...

“They” is error: the Corporation is a person independent of Members. On the legal proceedings referred to, see for example *Forwood v Lloyd's*, May 23, 1873, unreported (see the Hurst, Cornfield & Hurst report in the Corporation's Business Intelligence Centre). The theme of incremental growth in the Lloyd's enterprise recurs in subsequent Lloyd's Acts: see for example Lloyd's Act 1951, fourth recital (“the number of and the business carried on by members of the Society and the activities of the Society have increased and are increasing”); Lloyd's Act 1982, recital (5) (“Since 1968 the number of persons resident outside the United Kingdom admitted as members of the Society and the total number of members of the Society have both greatly increased”).

353 See Lloyd's Act 1871, s.4, etc.

354 Creating a corporation is a device of considerable antiquity and versatility: per James Grant, *A Practical Treatise on The Law of Corporations* (Butterworths, 1850), p.4, it was a means by which:-

municipalities were furnished with a form of government that never wore out; charitable trusts were secured to the objects of them so long as such objects should continue to be found; the protection, improvement and encouragement of trades and arts were permanently provided for; and learning and religion kept alive and cherished in times through which, probably, no other means can be mentioned that would appear equally well qualified to preserve them.

355 Lloyd's Act 1871, s.3: “[A]ll persons admitted as members of Lloyd's before or after the passing of this Act, are hereby united into a Society and Corporation for the purposes of this Act, and for those purposes are hereby incorporated by the name of Lloyd's, and by that name shall be one body corporate, with perpetual succession and a common seal, and with power to purchase, take, hold, and dispose, of lands and other property (which incorporated body is hereafter in this Act referred to as the Society).”

356 See for example *Journal of the House of Lords*, vol. 103, p.105-7; March 24, 1871.

357 The familiar “Society and Corporation of Lloyd's” is a myth: see p.184.

358 See Lloyd's Act 1871, s.5; *Lloyd's v Harper* (1880) 16 Ch.D. 290, 308 (Fry J).

359 Lloyd's Act 1871, s.6:-

Ibid.'s notion that it incorporated natural persons into a corporation is unnecessary, inappropriate and inaccurate. *Ibid.*, s.2³⁶³ annulled that deed of association,³⁶⁴ subject only to various legal fictions that preserved the *status quo* only so far as transitionally convenient. The Corporation's constitution remains at Lloyd's Acts 1871-1982; its formal statutory objects are at Lloyd's Act 1911, s.4. It is a mere private corporation aggregate, not a public³⁶⁵ body, public corporation³⁶⁶ or government department.³⁶⁷ It is not a statutory or any other type of company (nor was it an "insurance company" within the now obsolete Insurance Companies Act 1982 definition³⁶⁸), and has no directors in the statutory sense.

powers

3.36 The Corporation is expressly empowered to (for example):-

(1) hold real and personal property.³⁶⁹ The Corporation's personal assets are summarised in its annual report. As well as beneficially owned realty and personalty, the Corporation holds per-

Notwithstanding the annulling and incorporation aforesaid, any action, suit, prosecution, or other proceeding instituted before the passing of this Act by or against the Committee for managing the affairs of Lloyd's, or any person or trustee as aforesaid, shall not abate or be discontinued or be prejudicially affected by this Act, but on the contrary, shall continue and take effect both in favour of and against the Society, as it would have done in favour of or against that Committee, or the members thereof, or any of them, or any person or trustee as aforesaid, if this Act had not been passed, the Society being only substituted in or in relation thereto respectively for that Committee or the members thereof, or any one or more of them, or such person or trustee.

And see *Forwood v Lloyd's*, May 23, 1873, unreported (see the Hurst, Cornfield & Hurst report in the Corporation's Business Intelligence Centre). One of the Corporation's first litigious acts after incorporation was to apply to the Chancery Division for a declaration enforcing a guarantee given on behalf of a Member: *Lloyd's v Harper* (1880) 16 Ch.D. 290, 295(CA).

³⁶⁰ Lloyd's Act 1871, s.7:-

All debts due to the Committee for managing the affairs of Lloyd's, or to any person or trustee as aforesaid, with all interest (if any) due or to accrue due thereon, shall be paid to the Society, and shall be recoverable by them, and all debts due by such Committee person, or trustee as aforesaid, with all interest (if any) due or to accrue due thereon, shall be paid by the Society and shall be recoverable from them.

³⁶¹ See Lloyd's Act 1871, s.4; *Lloyd's v Harper* (1880) 16 Ch.D. 290, 307-308 (Fry J); 315 (James LJ).

³⁶² Lloyd's Act 1911, s.8(1), repealed by Lloyd's Act 1951, s.5(3) and re-enacted in *ibid.*, s.5(1) as amended by Lloyd's Act 1982, s 15(1)(d)).

³⁶³ Lloyd's Act 1871, s.2:-

On the passing of this Act, the deed of association, dated on or about the thirtieth day of August one thousand eight hundred and eleven, executed by members of the Establishment or Society of Lloyd's as existing before the passing of this Act, and any deed executed by other members by way of accession thereto, shall be and the same are and each of them is hereby annulled.

Before Lloyd's Act 1871, the Establishment was managed by and its property vested in a committee, the members of which held Establishment property on trust for the members as a whole for the time being in accordance with the 1811 deed: see Appendix 1.

³⁶⁴ The instant before Lloyd's Act 1871, s.3 created the Corporation, the Lloyd's enterprise principally comprised: (1) an unincorporated administrative establishment of waiters (and other functionaries), and the Room's boxes, somewhat resembling a coffeehouse; (2) an unincorporated association of subscribers governed by an alleged, apparently lost August 30, 1811 deed of association; a 1838 restatement described Lloyd's as "an Establishment or Society", a formula repeated in Lloyd's Act 1871. Given the two separate bodies, "or" was not accurate, notwithstanding that one governing committee of the society — known to itself and others as the "committee for managing the affairs of Lloyd's" — controlled the Establishment's budget and staff, and the society's membership and relevant collective funds, under one deed of association. Indeed, the two continually distinct components of the same enterprise militated in favour of dispensing with both of them and creating a new corporation. The alleged 1811 trust deed is set out in *Astor's Law of Lloyd's*, 2nd Ed. and can presumably be obtained from Lloyd's.

³⁶⁵ And the Corporation is presumably not a "public body" within Public Bodies Corrupt Practices Act 1889, s.7, Prevention of Corruption Act 1916, s.4(2), or otherwise.

³⁶⁶ The Corporation is not to be confused with the public corporation aggregate of the sort discussed in (for example) *Tamlin v Hannaford* [1950] 1 KB 18, 22 (Denning LJ), examples of which are or were the Bank of England, the East India Company, the Hudson's Bay Company, and various universities.

³⁶⁷ The UK government does not own any part of the Lloyd's enterprise, and it is a myth that Corporation staff are civil servants.

³⁶⁸ See Insurance Companies Act 1982, s.96(1) ("a person ... carrying on insurance business").

³⁶⁹ Lloyd's Act 1871, s.4.

sonality as trustee of various trusts.³⁷⁰ The Corporation also owns intellectual property such as the trademark “Lloyd’s of London”;³⁷¹

(2) merge with corporations and other entities.³⁷² So far this power has not been used. It requires Privy Council confirmation following the Board of Trade’s recommendation;

(3) be a trustee, either solely or jointly, of any trust deed, guarantee or other document relating to the insurance business carried on at Lloyd’s by Members or annual subscribers.³⁷³ The Corporation does act as sole trustee of the Lloyd’s Deposit trust deed, and sole “regulating trustee” under PTD (general) 1999;

(4) guarantee, either by itself or jointly with any other guarantor(s), the payment of claims and demands on insurance contracts underwritten by Members,³⁷⁴ for which purpose the Corporation may enter into relevant contracts,³⁷⁵ and may apply its own personal funds and property and the income therefrom.³⁷⁶ Such powers may be exercised by the Council in accordance with byelaws made under Lloyd’s Act 1982.³⁷⁷ The Corporation has given express indemnities to (for example) Centrewrite;³⁷⁸ Lioncover;³⁷⁹ various auditors;³⁸⁰ company market PSL underwriters under the PSL Administration Agreement;³⁸¹ managing agencies pursuant to forms of RRCs 2 and 8;³⁸² certain individuals and advisers including members of the Reserve Group, the directors and officers of Equitas Re the Equitas Re-reinsurance Trustees; Council members;³⁸³ participants on

³⁷⁰ For example, of each Member’s Lloyd’s Deposit Trust Deed.

³⁷¹ See p.201.

³⁷² Lloyd’s Act 1871, s.39.

³⁷³ Lloyd’s Act 1951, s.5(1). Historically, see for example Lloyd’s Act 1911, recitals:-

[6] And whereas in pursuance of the Assurance Companies Act 1909 or the regulations or requirements for the time being of the Society or the Committee or otherwise Members of the Society furnish security in the form of either a deposit with a trust deed or a guarantee or guarantees or partly in the one form and partly in the other which security is available solely for the purpose of meeting their liabilities in respect of policies underwritten by them or on their account at Lloyd’s and the Society have in the past acted as Trustee of certain of such trust deeds and guarantees either solely or jointly with others and doubts have arisen as to the power of the Society to so act and it is expedient that the action of the Society in acting as such Trustee in the past should be confirmed and that the Society should be authorised to act as Trustee of any trust deed or guarantee furnished by any Member of the Society as aforesaid: [7] And whereas it is expedient that the Society should be authorised itself to act as guarantor either solely or jointly with any other guarantor or guarantors as hereinafter in this Act provided and that the Society should in certain cases be authorised to make good any deficiency arising by reason of the default of any guarantor or the insufficiency of any security furnished by Members of the Society as aforesaid:

³⁷⁴ Lloyd’s Act 1911, s.9 as substituted by Lloyd’s Act 1982, s.15(1)(c). And see *ibid.*, s.7. For a US analogy, see for example *Dussault v Geldermann & Co.* 1975-6 Trade Cas (CCH) ¶60, 502 (D. Utah September 3, 1975).

³⁷⁵ Lloyd’s Act 1911, s.9 as substituted by Lloyd’s Act 1982, s.15(1)(c).

³⁷⁶ Lloyd’s Act 1911, s.9 and *ibid.*, s.7(d); and see *ibid.*, s.7(c) — as substituted by Lloyd’s Act 1982, s.15(1)(b) and (c).

³⁷⁷ Lloyd’s Act 1911, s.9.

³⁷⁸ An unlimited bond from the “Society” *SOD*, p.124.

³⁷⁹ Summarised at *SOD*, p.124; *SOD*, p.6; GR 1996, p.21 (“Security underlying policies issued at Lloyd’s: financial data as at 31 December 1996”, note 6); Corporation RA fye December 31, 2001, p.72; not mentioned in Equitas Holdings RA fye March 31, 2002.

³⁸⁰ *SOD*, App. 7, p.7-9. The Corporation’s liability is either 50% of such of the auditors’ contribution as is not applied for the benefit of Accepting Names (or Members party to an Action Group Settlement Agreement) or £20 million, whichever is the lesser: *SOD*, App. 7, p.8.

³⁸¹ *SOD*, App. 7, p.8-9. The Corporation’s indemnity is a maximum of £9m: *ibid.*, p.8.

³⁸² *SOD*, App. 7, p.9.

³⁸³ *SOD*, App. 7, p.9. And see *ibid.*, p.125:-

Lloyd’s has provided limited indemnities against potential future liabilities in respect of Names; claims against the five audit firms contributing to the auditor settlement fund and to the company market PSL underwriters which enter into the PSL Administration Agreement. In addition, indemnities have been, or are to be, given by Lloyd’s to certain individuals and advisers in respect of the Reconstruction and Renewal plan, including members of the Reserve Group, the directors and officers of Equitas and the Equitas Trustees and indemnities to members of the Council, the Lloyd’s Market Board and Lloyd’s Regulatory Board. The Council has resolved to set aside £20 million of the Central Fund to secure the performance of the Society’s obligations under certain of these indemnities. Lloyd’s has also provided indemnities to managing agents pursuant to the Supervisory Management Agreements and the Information and Administration Agreements.

SYAs whose managing agency had been Sasse;³⁸⁴ and Members who have entered into hardship agreements with the Corporation;³⁸⁵

(5) raise and borrow money and secure the same on its property in order to acquire any land or turn it to account, or for any other Corporation purpose.³⁸⁶ Query whether borrowing to fund the otherwise insolvent Central Fund or the several insurance businesses of otherwise insolvent individual Members is a proper purpose, even if external-regulatorily permitted; (6) undertake the discovery, recovery, protection, restoration or other disposal of property wrecked, sunk, lost, abandoned, found in, or recovered in on or beneath the sea or on the shore.³⁸⁷ The Corporation is particularly empowered to salvage from the 1799³⁸⁸ wreck of *The Lutine*.³⁸⁹

Lloyd's Act 1911, s.7 discretion

3.37 There presently appears to be no law on any assured's-at-Lloyd's legal right to any of the Corporation's³⁹⁰ (other) personal assets — apparently considered by self-regulators-at-Lloyd's not to be part of any of the four “links” in the “chain of security”— and no approximate caselaw. Lloyd's 1911, s.7³⁹¹ (inserted by Lloyd's Act 1982 in substitution for a narrower original³⁹² provision) purports to confer on the Council a discretion over the entirety of the Corporation's per-

384 *SOD*, p.124.

385 See the summary at *SOD*, p.125:-

Under this [hardship] scheme, the Society agrees to make good or, in some cases, to indemnify certain members in respect of their Lloyd's liabilities, without limit in time and amount, in consideration (amongst other matters) for the assignment to the Society of any rights under personal stop loss policies, any future profits from the member's underwriting business at Lloyd's and any rights the member may have to recover from his underwriting agents or anyone else in respect of his Lloyd's liabilities. The Society will make payments, as set out in Chapter 2, on behalf of those Names in hardship who choose to remain in hardship. To the extent individual agreements so provide, a Name in hardship will be able to call on the Society under its indemnity or covenant to meet any shortfall if Equitas is unable to pay the liabilities it has reinsured in full. Lloyd's has similar obligations in respect of Names who have reached a compromise or settlement agreement with Lloyd's (through the Financial recovery Department) or the US mediation plan (known as AIMS).

386 Lloyd's Act 1951, s.3(1). The Corporation may in particular alter, construct, decorate, fit up, furnish, improve, maintain, pull down and reconstruct buildings, whether intended for occupation wholly or partly by it or its members or subscribers or otherwise: *ibid*. It is not clear whether these particular powers are exercisable only in the context of the main s.3 power or in any event. For the Corporation to become a mere property developer would presumably be outside even a liberal construction of its Lloyd's Act 1911, s.4 objects.

387 Lloyd's Act 1871, s.34.

388 See for example Lloyd's Act 1871, recital [7].

389 See generally Lloyd's Act 1871, s.35, and *ibid.*, recitals [7]-[10].

390 The Corporation trades, as does a Member, with limited assets on the one hand and, on the other, no structural limitation on the quantity of liability it is capable of assuming, and with 100% liability exposure and 100% asset exposure. The Corporation has no capital structure. It has neither shareholders nor guarantors, including Members, who do not expressly guarantee its liabilities. Nothing in the Corporation's constitution (Lloyd's Acts 1871-1982) limits the extent to which its necessarily limited assets are exposed to having to pay its debts. The Corporation's personal assets — interests in relevant realty, the Nelson Collection, the Adam Room, the computers, intellectual property, affiliates' annual dues, etc — are separate and distinct from the assets comprising any common-use claims securitisation fund. Nothing in its constitution prohibits the Corporation from making a profit in its trading activities.

391 Lloyd's Act 1911, s.7 (“Purposes for which capital stock, &c. to be held by Society”) as substituted by Lloyd's Act 1982, s.15(1)(b):-

The Society shall hold the funds and property of the Society and the income therefrom for all or any of the following purposes:— (a) for defraying the costs, charges and expenses incurred by the Society, the Council or otherwise in the execution and carrying out of Lloyd's Acts 1871 to 1982; (b) for furthering the objects of the Society; (c) for making good any default by any member of the Society under any contract of insurance underwritten at Lloyd's which in the opinion of the Council it is in the interests of the members of the Society to make good; (d) for guaranteeing or securing, in such manner as the Council think fit, any debt or obligation of or binding on the Society, any of its subsidiaries or any other person; (e) for such other purposes (if any) as may from time to time be prescribed by byelaw; and subject thereto for the benefit of the members of the Society jointly.

392 The previous, original s.7 read:-

The Society shall hold the capital stock and other funds and property of the Society and the dividends and interest thereon for the purpose of defraying the costs charges and expenses of the Society and the Committee or otherwise in the execution and carrying out of Lloyd's Acts 1871 to 1911 and otherwise in furthering the objects of the Society and for such other purposes (if any) as may be prescribed by any bye-laws of the Society and subject thereto for the benefit of the Members of Lloyd's jointly.

sonal assets, particularly in relation to the paying of a valid claim. In s.7, the Corporation is required to hold such assets as it does happen to have — not subject to any external regulatorily prescribed minima — and the income therefrom, for all or any of the following purposes: (1) to further its objects;³⁹³ (2) to defray the costs, charges and expenses incurred by the Corporation, the Council, or otherwise in carrying out Lloyd's Acts 1871-1982;³⁹⁴ (3) to make good any default by any Member under any insurance³⁹⁵ contract (but no other sort of contract) underwritten at Lloyd's which *in the Council's opinion* it is in the interests of Members to make good;³⁹⁶ (4) to guarantee or secure, in such manner as the *Council thinks fit*, any debt or obligation of or binding on the Corporation, any of its subsidiaries, or any other person.³⁹⁷ There are concomitant powers;³⁹⁸ (5) for such other purposes (if any) as may from time to time be prescribed by byelaw (*viz.*, in the Council's exercise of its Lloyd's Act 1982, s.6(2) discretion); and subject thereto for the benefit of Members jointly.³⁹⁹ The Council may vote Corporation money for purposes other than those of the Corporation's business, but every such vote in excess of £10,000 must be reported in the Corporation's annual accounts.⁴⁰⁰ Separately, *ibid.*, s.9⁴⁰¹ purports to confer on the

³⁹³ Lloyd's Act 1911, s.7(b), as substituted by Lloyd's Act 1982, s.15(1)(b). Lloyd's Act 1911, s.4 ([] and numbers therein added):-

The objects of the Society shall be:- [1] The carrying on by Members of the Society of the business of insurance of every description including guarantee business; [2] The advancement and protection of the interests of Members of the Society in connection with the business carried on by them as Members of the Society and in respect of shipping and cargoes and freight and other insurable property or insurable interests or otherwise; [3] The collection publication and diffusion of intelligence and information; [4] The doing of all things incidental or conducive to the fulfilment of the objects of the Society.

Per Lloyd's Act 1871, s.10 (repealed by Lloyd's Act 1911, s.4):-

The objects of the Society shall be: — The carrying on of the business of marine insurance by members of the Society; The protection of the interests of members of the Society in respect of shipping and cargoes and freight; The collection, publication, and diffusion of intelligence and information [with respect to shipping].

The words in square brackets were repealed by Lloyd's Act 1888, s.2. The objects are set out "in a manner analogous to the objects clause in the memorandum of a public company": *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176, 182 (Q.B. Div. Ct.). The objects are those of, and only of, the Corporation, not of any other entity, person or body including Members collectively or any society. The objects merely delineate the Corporation's personal aspirations, not its express obligations: see *Ashmore v Lloyd's* (No. 2) [1992] 2 Lloyd's Rep. 620, 632 (Gatehouse J; "The first difficulty that the plaintiffs have to face is that the Statute [Lloyd's Act 1911, s.4] does not impose any express duty upon Lloyd's: it speaks only of "objects".). The objects give the Corporation no independent mission, trade or vocation of its own, and appear to make it wholly subordinate to SYA participants' insurance businesses, to which extent the Corporation is best visualised as a hollow shell existing principally for the self-regulatory convenience of the Council and the administrative and commercial convenience of Members: see the error at *R v Committee of Lloyd's, ex p. Posgate* (Q.B. Div. Ct.) *The Times*, January 12, 1983; *Financial Times*, January 14, 1983 ("The affairs of the Society plainly include the business of the Society, which is the business of insurance"). None of its four objects envisages that the Corporation will enter into any insurance obligations. And see *Scott v Tuff-Kote (Australia) Pty. Ltd.* [1976] 2 Lloyd's Rep. 103, 107 (Needham J): "Although incorporated, [the Corporation] is a trade association, not fundamentally different from other trade or professional associations. It is the members who underwrite policies; it is the members who are liable to be sued on such policies." *Rozanes v Bowen* (1928) 32 Lloyd's List Law Reports, 98 (CA); *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J); *Thompson v Adams* (1889) 23 Q.B.D. 361; *Acme Wood Flooring Co. Ltd. v Marten* (1904) 20 T.L.R. 229. And see Lloyd's Act 1871, s.40 as amended by Lloyd's Act 1911, s.5. The objects confer no express benefit directly on any assured-at-Lloyd's or the public at large.

³⁹⁴ Lloyd's Act 1911, s.7(a), as substituted by Lloyd's Act 1982, s.15(1)(b).

³⁹⁵ In *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J), the judge held that not all insurance liabilities necessarily did fall on the then Lloyd's enterprise. *Ibid.*, 83:-

[I]t is ... wholly impossible to hold that a person who conspires with another to conceal from the Committee of Lloyd's the transactions of that other can possibly be held entitled, after continuing as he knows without the consent of Lloyd's and against their will if they knew the facts, and having increased his liabilities, to expect the Committee of Lloyd's to be responsible for them.

³⁹⁶ Lloyd's Act 1911, s.7(c), as substituted by Lloyd's Act 1982, s.15(1)(b).

³⁹⁷ Lloyd's Act 1911, s.7(d), as substituted by Lloyd's Act 1982, s.15(1)(b); but see Lloyd's Act 1911, sixth recital. The Corporation owns a variety of subsidiaries.

³⁹⁸ See for example Lloyd's Act 1911, s.9 (power with reference to guarantees).

³⁹⁹ Lloyd's Act 1911, s.7(e), as substituted by Lloyd's Act 1982, s.15(1)(b).

⁴⁰⁰ Byelaw 15 of 1983, §6.

⁴⁰¹ Lloyd's Act 1911, s.9 ("Powers to Society with reference to guarantees"; italics added):-

Without prejudice to the provisions of section 7 of this Act the Society may either by itself or jointly with any other guarantor or guarantors guarantee the payment of claims and demands upon contracts of insurance underwritten at Lloyd's and the So-

Council a mere discretion as to whether to use the Corporation's personal assets to honour a Corporation guarantee to pay such liabilities.

Old Central Fund Byelaw discretion

- 3.38** In relation to the Corporation's (other) personal assets, the Council rehearses in substantially duplicative provisions its Lloyd's Act 1911, s.7 discretion.⁴⁰² The Corporation's (other) personal assets "may be applied and such funds or property may be charged" — and may, particularly, be conditionally or otherwise put in trust, charged, appropriated or set apart⁴⁰³ — to: (1) make good any default by any member of the Society under any contract of insurance underwritten at Lloyd's;⁴⁰⁴ (2) prevent the occurrences or reducing the extent of such default by any Member;⁴⁰⁵ (3) compensate in whole or in part any person for making for or on behalf of any Member any payment which has had the effect of preventing or reducing such defaults by any such Member;⁴⁰⁶ (4) extinguish or reduce the liability of any Member to any person whatsoever, whether or not arising under a contract of insurance where in the opinion of the Council it is expedient for the advancement and protection of the interests of the Members in connection with the business carried on by them at Lloyd's.⁴⁰⁷ The Council has amended the Old Central Fund Byelaw to permit itself to comply with FSA Lloyd's Rulebook provisions concerning the availability of the Corporation's (other) personal assets to pay claims, but still in terms of discretion ("the Council may direct ..."⁴⁰⁸).

self-regulators'-at-Lloyd's representations

- 3.39** Self-regulators-at-Lloyd's traditionally make no public representations as to the Lloyd's Act 1911, s.7 availability of the Corporation's (other) personal assets.

in practice

- 3.40** Self-regulators-at-Lloyd's have used (outright or by pledge) the Corporation's (other) personal assets to (for example) securitise R&R-related loans, fund the R&R settlement, and indemnify Centrewrite and Lioncover.⁴⁰⁹

ciety may for such purposes enter into contracts and *may* apply the funds and property of the Society and the income therefrom or any part thereof for the purpose of discharging any liabilities of the Society under any guarantees or contracts as aforesaid and the powers conferred on the Society by this section may be exercised by the Council in accordance with by-laws made under Lloyd's Act, 1982.

⁴⁰² See generally Old Central Fund Byelaw, §8 ("Application of other funds or property of the Society") and *ibid.*, §8A ("Interim application of Central Fund or of other funds or property of the Society").

⁴⁰³ Old Central Fund Byelaw, §8A(1).

⁴⁰⁴ Old Central Fund Byelaw, §8(a).

⁴⁰⁵ Old Central Fund Byelaw, §8(b).

⁴⁰⁶ Old Central Fund Byelaw, §8(c).

⁴⁰⁷ Old Central Fund Byelaw, §8(d).

⁴⁰⁸ See for example Old Central Fund Byelaw, §8A(2):-

Without prejudice to the generality of sub-paragraph (1), where at any time the general insurance business assets of a member of the Society are less than the required amount calculated under LLD 11.2.6R or the long term insurance business assets of a member of the Society are less than the required amount calculated under LLD 11.2.7R the Council may direct that monies or other assets in the Central Fund or any other monies or assets of the Society be put in trust, charged, appropriated or set apart, conditionally or otherwise, (whether separately or part of monies or assets so dealt with in respect of more than one member) with a view to their application out of the Central Fund or, as the case may be, out of the other fund or property of the Society in question, for any of the purposes mentioned in paragraph 7(a) to (d) or paragraph 8(a) to (d) respectively. (3) In this paragraph references to a "member of the Society" shall be taken to refer also to former members and the estates of deceased members. (4) In this paragraph "general insurance business assets", "long term insurance business assets" and "required amount" have the same meanings as in LLD 11.2.1R".

⁴⁰⁹ See p.139.

all discretions apparently overridden by the FSA Lloyd's Rulebook

orientation

- 3.41** The FSA Lloyd's Rulebook appears to seek to ensure the availability of the Central Fund and the Corporation's (other) personal assets to pay EquitasRe-reinsured liabilities and to override all Council discretions, arrangements, measures and other devices intended — politically rather than self-regulatorily — to “ringfence” those liabilities from current underwriting Members. Self-regulators-at-Lloyd's appear to recognise⁴¹⁰ the supremacy of FSA rules concerning the Lloyd's enterprise over self-regulatory measures. For example, the Council: (1) requires that every “requirement of the Council”⁴¹¹ must be read and given effect by it in a way which is compatible with the provisions of the Financial Services and Markets Act 2000 and any rule, direction, requirement, principle, evidential provision, code and guidance made, issued or given by the FSA under that Act “[s]o far as it is possible to do so”,⁴¹² which appears to negate all its various discretions, byelaw self-improvement, undertakings, and all other measures and devices intended to create and preserve a “ringfence” around the Lloyd's enterprise in relation to EquitasRe-reinsured liabilities; (2) empowers (but does not require) itself to “give a direction to any person or any class or classes of person carrying on the business of insurance at Lloyd's to do such acts and things as may be necessary or appropriate”, which — though the byelaw alludes⁴¹³ to relieving a Member of a burden, not to imposing one on him — presumably includes to pay money contrary to a prior undertaking given to that Member by the Council, (*a fortiori* one given in bad faith or otherwise in breach of the Council's self-regulatory obligations or in excess of its self-regulatory powers).⁴¹⁴ But the byelaw does not expressly allude to incompatibility between relevant FSA rules and contrary byelaws promulgated or undertakings given by the Council.

FSA Lloyd's Rulebook concerning the Central Fund

- 3.42** FSA Lloyd's Rulebook's provisions on the Central Fund⁴¹⁵ (promulgated after R&R), though rightly making no distinction between (for example) the Old Central Fund and the New Central

⁴¹⁰ See generally Financial Services Authority Byelaw (Byelaw 7 of 2001).

⁴¹¹ Per Glossary Byelaw (No. 8 of 2001), §1, “requirement of the Council” means:-
any requirement imposed by any byelaw or regulation made under Lloyd's Acts 1871 to 1982 or under the authority given by any premiums trust deed, any core principle, code or practice, condition or requirement made or imposed or direction given under any such byelaw regulation or authority and any direction given under section 6 of Lloyd's Act 1982, any requirement imposed by or under any agreement, deed or other instrument between Lloyd's or the Council and any member, underwriting agent, or any trustee of any premiums trust deed, or by or under any undertaking in favour of Lloyd's or the Council given by a member, any underwriting agent or any trustee of any premiums trust deed, and any other direction or requirement given or made by the Council under Lloyd's Acts[.]

⁴¹² Financial Services Authority Byelaw (Byelaw 7 of 2001), §1.

⁴¹³ See Financial Services Authority Byelaw (Byelaw 7 of 2001), §2 (“If the Council is satisfied that any requirement of the Council is incompatible with any provision of the Financial Services and Markets Act 2000 or any rule, direction, requirement, principle, evidential provision, code or guidance made, issued or given by the Financial Services Authority under that Act the Council may dispense any person to whom the requirement applied or applies from complying with the requirement with effect from the day on which the incompatibility arose.”) and *ibid.*, §3 (“Any dispensation given under paragraph 2 of this byelaw – (a) may be made individually or in respect of any class or classes of person; (b) may make different provision for different cases; and (c) may include such additional directions, conditions or requirements as the Council considers necessary or appropriate.

⁴¹⁴ Financial Services Authority Byelaw (Byelaw 7 of 2001), §4:-

The Council may, for the purpose of giving effect to, implementing or discharging any direction, requirement or obligation that the Financial Services and Markets Act 2000 or the Financial Services Authority has given to, placed on or imposed on the Council or the Society, give a direction to any person or any class or classes of person carrying on the business of insurance at Lloyd's to do such acts and things as may be necessary or appropriate.

⁴¹⁵ FSA Lloyd's Rulebook, Chapter 3:-

3.1.1 This chapter applies to the Society. 3.1. 2 A contravention of the rules in this chapter does not give rise to a right of action by a private person under section 150 of the Act (Actions for damages) and each of those rules is specified under section 150(2) of the Act as a provision giving rise to no such right of action. 3.1.3 The rules and guidance in this chapter are intended to promote confidence in the market at Lloyd's, and to protect certain consumers of services provided by the Society in carrying on, or in connection with or for the purposes of, its regulated activities. They do this by: (1) giving guidance to the Society about the protection that the Central Fund should provide for policyholders; and (2) enabling the FSA to keep under review the protection the Central Fund provides for policyholders.

Fund,⁴¹⁶ or between RRC 4 “1992 and Prior Business” and any other liabilities incurred at Lloyd’s, or between liabilities reinsured and not reinsured by Equitas Re, appear to be of little assistance to the EquitasRe-assured-at-Lloyd’s. Though proclaiming “the significance of the Central Fund in the protection of policyholders”⁴¹⁷ and its intention to “promote confidence in the market at Lloyd’s, and to protect certain consumers of services”,⁴¹⁸ FSA Lloyd’s Rulebook’s central provision on the Central Fund — “The Society should seek to ensure that the Central Fund provides protection for policyholders at least equivalent to that available to other policyholders under the [FSA] [C]ompensation [S]cheme”⁴¹⁹ — is infelicitous. For example: (1) it is not (competently) framed as an obligation. To the extent that eligible claims on and or relevant funding to the New Central Fund are purportedly within the discretion of Members, the Central Fund lacks the certainty of eligibility, the certainty of compensation and the obligation to pay levies of the FSA Compensation Scheme; (2) it confuses the Corporation with the Council;⁴²⁰ (3) while the Lloyd’s enterprise purports to be solvent and trades as a going concern, any compensation figure less than 100%⁴²¹ is illogical in isolation, and inconsistent with the FSA Compensation Scheme Rulebook’s application to insurance companies in financial difficulty. In any event, the FSA appears to have no power unilaterally, without notice to relevant assureds-at-Lloyd’s, and without requiring self-regulators-at-Lloyd’s to correct “chain of security” representations — the essence of which is solvent (and, in the absence of any other represented figure, arguably insolvent) securitisation *superior* to that of conventional insurance businesses — to dispossess any assured-at-Lloyd’s of, or to exonerate the Council from having to provide, 100% indemnity as represented.

3.2 The Central Fund 3.2.1 The Society should seek to ensure that the Central Fund provides protection for policyholders at least equivalent to that available to other policyholders under the compensation scheme. 3.2.2 The Society should seek, and take appropriate account of, the FSA’s views on all proposed changes in its arrangements relating to the Central Fund.

3.3 Information about the Central Fund 3.3.1 The Society must give the FSA a report on the Central Fund as at the end of each calendar quarter. 3.3.2 The report referred to in LLD 3.3.1R must reach the FSA within two weeks of the end of each calendar quarter and must include information on: (1) the net market value of the Central Fund; (2) payments made from the Central Fund in that quarter; (3) the types of investment in which the Central Fund is held; (4) the commencement or cessation of, or any changes in the terms of, any insurance policy taken out to protect the Central Fund; and (5) any claim made, or circumstances notified that are likely to lead to a claim, under any insurance policy taken out to protect the Central Fund. 3.3.3 Because of the significance of the Central Fund in the protection of policyholders, the Society should notify the FSA under LLD 3.3.2R(5) of all matters relevant to any actual or potential claim. These include but are not limited to the facts on which that claim is based, the circumstances under which those facts arose and any relevant response to the claim from any insurer or reinsurer concerned.

⁴¹⁶ See FSA Glossary, definition of “Central Fund”: “the Central Fund established under Lloyd’s Central Fund Byelaw (No 4 of 1986) and the New Central Fund established under Lloyd’s New Central Fund Byelaw (No 23 of 1996). Historically, see for example CP 66, §4.25, fn. 5 (“the Central Fund and New Central Fund ...”).

⁴¹⁷ FSA Lloyd’s Rulebook, §3.3.3G.

⁴¹⁸ FSA Lloyd’s Rulebook, §3.1.3G. And see for example CP 48, §7.12:-

The Society has confirmed that the information required [by the FSA under the then proposed FSA Lloyd’s Rulebook] on the Central Fund can be provided to the FSA at minimal additional cost because it is already collated for internal reporting purposes. Some additional costs will be incurred by both the Society and the FSA in resolving any enquiries arising from these reports and discussing any proposed changes in the Central Fund arrangements. This will be important, however, for the protection of policyholders who depend on Lloyd’s common security.

⁴¹⁹ FSA Lloyd’s Rulebook, §3.2.1G. See historically CP 48, §1.6:-

Members of Lloyd’s will not have access to the Financial Ombudsman Service, and neither they nor Lloyd’s policyholders will have access to the new compensation scheme. The draft LLD contains provisions designed to ensure that ... the FSA can properly monitor whether the Society’s Central Fund offers Lloyd’s policyholders equivalent protection to that available to policyholders of insurance companies under the new compensation scheme.

“[N]ew compensation scheme” is materially misleading: the FSA Compensation Scheme is in all relevant respects identical to the Policyholders Protection Act 1977 scheme. Under that regime there was no suggestion that the Central Fund was required to provide only 90% compensation.

⁴²⁰ The Corporation has no primary self-regulatory powers or functions whatever in relation to the Central Fund or anything else: see Lloyd’s Act 1982, s.6(1) *et seq.*

⁴²¹ See FSA Compensation Scheme Rulebook, §10.2.3: “Protected contract of insurance when the contract is a relevant general insurance contract (1) Where the claim is in respect of a liability subject to compulsory insurance: 100% of claim. (2) Where the claim arises under the Third Party (Rights against Insurers) Act 1930, is in respect of a liability within COMP 5.4.5R(1)(b), and is in connection with an Article 9 default: 90% of the claim. (3) In all other cases: 100% x first £2,000[:]; 90% of remainder of the claim.”

FSA Lloyd's Rulebook concerning the Corporation's personal assets

- 3.43 FSA Lloyd's Rulebook clearly is of the view that the Corporation's personal assets necessarily and unavoidably guarantee each SYA participant's insurance liabilities,⁴²² and that those assets are to be used to pay, and should be managed with a view to being able to pay, SYA participants' insurance liabilities. The starting point is part⁴²³ of the FSA Glossary's definition of "central assets", viz., "assets that the Society owns ...". FSA Lloyd's Rulebook requires the Corporation to (for example): (1) maintain "central assets" sufficient to cover (among other things) each SYA participant's general business deficit and SYA participants' overall general business deficit,⁴²⁴ and must keep the FSA informed of its failure to do so.⁴²⁵ (2) "manage its affairs, including the exercise of its byelaw-making powers, with due regard to the interests of policyholders and potential policyholders";⁴²⁶ No distinction is drawn between any assured-at-Lloyd's; (3) "ensure that its affairs are soundly and prudently managed and take reasonable steps to ensure that the Lloyd's market is soundly and prudently managed";⁴²⁷ (4) "having regard to the availability and value of the central assets of the Society, ensure that its assets and its members' assets are adequate to meet the liabilities which members assume in their insurance business at Lloyd's";⁴²⁸ (5)

⁴²² See for example FSA Lloyd's Rulebook, §11.5:-

11.5.1 The Society must calculate the required minimum margin it would have to maintain under IPRU(INS) 2 (Margins of solvency) if it were an insurer carrying on all the general insurance business carried on by its members, but eliminating inter-syndicate reinsurance (the Society margin). 11.5.2 The Society must calculate the guarantee fund it would have to maintain under IPRU(INS) 2 (Margins of solvency) if it were an insurer carrying on all the general insurance business carried on by its members, but eliminating inter-syndicate reinsurance (the Society guarantee fund). 11.5.3 The required minimum margin and the guarantee fund must, under IPRU(INS), at least equal the minimum guarantee fund. So the Society margin and the Society guarantee fund must at least equal the minimum guarantee fund which would apply if the members taken together constituted an insurer, other than a mutual, authorised for all classes of general insurance business carried on at Lloyd's. ... 11.5.5 For the purpose of LLD 11.5.1R and LLD 11.5.2R the Society may make appropriate approximations, taking reasonable care to avoid underestimating the Society margin and the Society guarantee fund.

⁴²³ The definition in full: "[A]ssets that the Society owns and amounts that members are liable to pay to the Society (or may by resolution of the Council be liable to pay) as contributions to the Central Fund (excluding amounts which, if paid by a member, would cause his assets to fall short (or shorter) of the required amount)".

⁴²⁴ FSA Lloyd's Rulebook, §11.2.1:-

The Society must maintain net central assets which are adequate to cover the aggregate of: (1) for each member, the amount by which his general insurance business assets are less than the required amount calculated under LLD 11.2.6R; (2) for each member, the amount by which his long-term insurance business assets are less than the required amount calculated under LLD 11.2.7R; (3) the excess (if any) of the amount calculated under LLD 11.5.1R (the Society margin) over the sum for all members of the members' margins for general insurance business; and (4) the excess (if any) of the sterling equivalent of 800,000 Euros (using the conversion rate notified by the FSA from time to time for this purpose) over the sum for all members of the members' margins for long-term insurance business.

And see *ibid.*, §9.3.5: "The central prudential safeguard is for the Society to maintain sufficient net assets to cover any shortfall in members' resources."

⁴²⁵ FSA Lloyd's Rulebook, §11.2.4:-

The Society must inform the FSA promptly if: (1) its net central assets fall below the amount required under LLD 11.2.1R; or (2) it cannot confirm that it has maintained the net central assets required under LLD 11.2.1R. If the Society fails to maintain the net central assets required under LLD 11.2.1R, the FSA would expect to require the Society to prepare and submit a plan for the restoration of a sound financial position similar to that required from insurers by SUP App 2 1.3, and other remedies might also apply, including the FSA's exercise of its own-initiative power under section 45 of the Act (Variation etc. on the Authority's own initiative).

And see similarly *ibid.*, §11.2.11.

⁴²⁶ FSA Lloyd's Rulebook, §9.2.1.

⁴²⁷ FSA Lloyd's Rulebook, §9.2.2.

⁴²⁸ FSA Lloyd's Rulebook, §9.2.5.

ensure those assets are readily available and sufficient to pay claims;⁴²⁹ (6) “identify its assets and value them in accordance with this chapter and LLD 14 (Assets: market and credit risk)”.⁴³⁰

but in practice, apparently no access or extraction mechanism

- 3.44** The back-office managing agency-based mechanisms which ordinarily at Lloyd’s would trigger the Central Fund’s use as a personal-use-fund float are entirely absent at Equitas Re. Notwithstanding the FSA Lloyd’s Rulebook, self-regulators’-at-Lloyd’s acceptance (if any) of the principle of availability, and the presence of relevant assets in the Central Fund and standing (otherwise) to the account of the Corporation, there appears to be no mechanism at Lloyd’s for any EquitasRe-assured-at-Lloyd’s — whether directly or through his Lloyd’s broker, Equitas Re or Equitas Policyholders Trustee — or other relevant person or body, to access any such assets, to notify the Council of the need for access, for the Council to evaluate claims or to disburse relevant funds. An appropriate course, therefore, is apparently to make a formal application to the Council via the Chairman of Lloyd’s⁴³¹ with a copy to the FSA’s Chairman, and for the Council to devise such mechanisms.

RECOURSE ARGUMENTS OF PRINCIPLE

orientation

- 3.45** This section addresses some arguments of principle as to why the Central Fund and the Corporation’s (other) personal assets should be made available, discretionarily or not, to pay claims at Lloyd’s. Conventionally at Lloyd’s, no assured-at-Lloyd’s claims, or ordinarily ever needs to claim, directly against either the Central Fund or the Corporation’s (other) personal assets. No express procedure or channel exists at Lloyd’s for such a claim. To relieve the relevant impecuniosity of a relevant SYA participant, at the instance of the latter’s managing agency (for which special procedures exist⁴³²), the Council will always deploy the Central Fund in the assured’s-at-Lloyd’s favour, as personal-use-fund float. In the case of an EquitasRe-assured-at-Lloyd’s, however, there is no mechanism for Equitas Re to call on the Council to deploy it as a float for any personal-use fund, any RRC 4, §3 liability, or any *ibid.*, §9 expense. An unpaid EquitasRe-assured-at-Lloyd’s, wishing to neither settle nor seek the final judgment on which access to some⁴³³ dedicated common-use funds depends, is free in principle to apply to the Council for Central Fund 100% indemnification, and there appears to be no legal basis — taking the entire Lloyd’s enterprise into account — on which the Council is entitled to refuse the demand (reimbursement, if any, following Central Fund deployment being normal practice). In practice, the Council is presumably more likely to seek to influence, presumably through Equitas Holdings’ “Lloyd’s Director”,⁴³⁴ a solvent Equitas Re to pay the claim in full rather than use the Central Fund and set an inconvenient precedent.

⁴²⁹ FSA Lloyd’s Rulebook, §9.2.6: “The Society must: (1) ensure that its admissible assets: (a) that are investments are diversified and adequately spread; and (b) taking into account the risks posed to the Society by its activities and by the insurance business carried on by members, are of appropriate safety, yield, maturity and marketability[.]” And see *ibid.*, 13.3.1 etc. including (for example) *ibid.*, §13.3.1 “LLD 9.2.6R requires the Society to ensure that its admissible assets, and to take reasonable steps to ensure that members’ admissible assets, are of appropriate maturity and marketability. In doing so, the Society should have regard to the expected timing of liabilities (especially policyholder claims) and the need to make a prudent allowance for the risk that liabilities may fall due earlier than expected.” Per FSA Glossary, “admissible asset” means “an asset that may be taken into account for the purposes of the solvency requirements in LLD 11.2.1R in accordance with LLD 13.4.1R”.

⁴³⁰ FSA Lloyd’s Rulebook, §13.2.1.

⁴³¹ See Lloyd’s Act 1982, s.3.

⁴³² Broadly, the managing agency declares that a relevant shortfall exists and requests a Central Fund disbursement.

⁴³³ See pp.107, 111.

⁴³⁴ See p.22.

why the Lloyd's enterprise rather than Equitas Re or the EquitasRe-reinsured SYA participant?

the impracticability of pursuing each or any individual SYA participant

- 3.46 The comprehensive impracticability of pursuing each or any relevant individual SYA participant, EquitasRe-reinsured or otherwise, is discussed elsewhere.⁴³⁵

self-regulators'-at-Lloyd's acknowledgment in self-regulation

- 3.47 Statutory and byelaw provisions concerning the use of the Central Fund and the Corporation's (other) personal assets bespeak an orientation towards, rather than away from, paying claims, viz.: (1) furthering the Corporation's objects;⁴³⁶ (2) making good any default by any Member under any insurance contract sold at Lloyd's which in the Council's opinion it is in Members' interests to make good;⁴³⁷ (3) preventing the occurrence or reducing the extent of such default;⁴³⁸ (4) compensating in whole or in part any person for making for or on behalf of any Member any payment which has had the effect of preventing or reducing such default;⁴³⁹ (5) extinguishing or reducing the liability of any Member to any person whatsoever, whether or not arising under an insurance contract where in the Council's opinion it is expedient for the advancement and protection of the interests of Members in connection with the business carried on by them as Members;⁴⁴⁰ (6) guaranteeing or securing, in such manner as the Council think fit, any debt or obligation of or binding on the "Society", any of its subsidiaries or any other person.⁴⁴¹

self-regulators'-at-Lloyd's "chain of security" representations

- 3.48 Self-regulators'-at-Lloyd's representations about the Central Fund's availability are discussed elsewhere: see p.118.

self-regulators'-at-Lloyd's acknowledgment in R&R instruments

- 3.49 Self-regulators-at-Lloyd's emphasise the continuing liability of EquitasRe-reinsured SYA participants,⁴⁴² viz., relevant personal-use and common-use funds at the Lloyd's enterprise, not⁴⁴³ the SYA participant as an individual. And they expressly acknowledge the liability of persons (the terminologically infelicitous "Society"⁴⁴⁴) other than merely EquitasRe-reinsured SYA participants to pay EquitasRe-reinsured liabilities in full. For example, *SOD*, p.123-124: "The Society has a number of contingent liabilities in respect of risks under policies allocated to 1992 or prior years of account. If Equitas is unable to pay the 1992 and prior liabilities in full, the Soci-

⁴³⁵ See p.165.

⁴³⁶ Lloyd's Act 1911, s.7(b) (the Corporation is statutorily required). The Corporation's objects are at Lloyd's Act 1911, s.4 ([] and numbers therein editorially added):-

The objects of the Society shall be:— [1] The carrying on by Members of the Society of the business of insurance of every description including guarantee business; [2] The advancement and protection of the interests of Members of the Society in connection with the business carried on by them as Members of the Society and in respect of shipping and cargoes and freight and other insurable property or insurable interests or otherwise; [3] The collection publication and diffusion of intelligence and information; [4] The doing of all things incidental or conducive to the fulfilment of the objects of the Society.

⁴³⁷ Lloyd's Act 1911, s.7(c) (the Corporation is statutorily required); Old Central Fund Byelaw, §8(a) (the Council empowers itself).

⁴³⁸ Old Central Fund Byelaw, §8(b) (the Council empowers itself).

⁴³⁹ Old Central Fund Byelaw, §8(c) (the Council empowers itself).

⁴⁴⁰ Old Central Fund Byelaw, §8(d) (the Council empowers itself). On "advancement and protection", see Lloyd's Act 1911, s.4, the Corporation's second statutory object: "The objects of the Society shall be:— ... The advancement and protection of the interests of Members of the Society in connection with the business carried on by them as Members of the Society and in respect of shipping and cargoes and freight and other insurable property or insurable interests or otherwise[.]"

⁴⁴¹ Lloyd's Act 1911, s.7(d) (the Corporation is statutorily required).

⁴⁴² See for example *SOD*, App. 5, §1.7 ("Since Names retain the ultimate liability for these claims, policyholders will be entitled to pursue Names for the balance of any claim.").

⁴⁴³ See p.165.

⁴⁴⁴ See p.184.

ety will be liable to meet *any* shortfall arising in respect of these policies”⁴⁴⁵ — not conceptually dissimilar from “The Council believes that, although absolute finality cannot be achieved for all Names, the combination of the settlement offer and the Equitas RITC provides Names with the best means of achieving ‘finality’.”⁴⁴⁶ The Corporation has given express formal indemnities to Centrewrite and Lioncover accordingly. Presumably it was for internal political, rather than self-regulatory, reasons that the Corporation did not give an express indemnity to Equitas Re; self-regulators-at-Lloyd’s have acknowledged⁴⁴⁷ that the premise applies equally to Equitas Re. RRC 1, recital (I) is not irrelevant: “Nothing in this Settlement Agreement shall relieve an Accepting Name from any liabilities to policyholders arising from his underwriting at Lloyd’s.” from which it must follow that the RRC 1 Accepting Name remains a conduit to recourse funds at the Lloyd’s enterprise. But *SOD* — a document directed to EquitasRe-reinsured SYA participants, not to any EquitasRe-assured-at-Lloyd’s — contains apparently inconsistent indications as to recourse to the Lloyd’s enterprise for EquitasRe-reinsured liabilities, *viz.*, to the Lloyd’s enterprise;⁴⁴⁸ not to the Lloyd’s enterprise;⁴⁴⁹ to individual EquitasRe-reinsured SYA participants personally.⁴⁵⁰ *SOD* also contains a mis-statement⁴⁵¹ concerning the New Central Fund’s availability to pay an EquitasRe-reinsured liability.

SYA-level “ringfence” unobjectionable

- 3.50** The Council is statutorily empowered⁴⁵² to “regulate and direct the business of insurance at Lloyd’s”. Two measures appear to be unobjectionable: the Council’s pre-R&R prohibition⁴⁵³ on participants on SYAs budding in an UY after 1993 selling RTC to participants on SYAs budding in or before the 1986 UY, and its prohibition on SYA participants selling outward reinsurance to Equitas Re.⁴⁵⁴ In releasing the already exposed SYA participant from the obligation to provide personal-use funds and contribute to common-use funds, as in RRC 1,⁴⁵⁵ self-regulators-at-Lloyd’s similarly appear to be acting *intra vires*, in principle. Personal-use funds are necessarily peripheral to the securitisation of claims, while common-use funds are not endangered provided a sufficient rump of Members remains to contribute sufficiently to them for as long as the Lloyd’s enterprise wishes to continue to trade.

Membership-level “ringfence” apparently misconceived

- 3.51** There appears to be no⁴⁵⁶ legal basis for “ringfencing” EquitasRe-reinsured liabilities at Membership level, an apparently financial and political device inherently at odds with self-regulatory responsibilities. Its three principal manifestations are: (1) the Council purporting to prevent itself

⁴⁴⁵ *SOD*, p.123; italics added. Note the unclear, ambiguous and or inconsistent use of “Society” to mean Members and or the Corporation. And see for example *ibid.*, p.7:-

The reinsurance of these liabilities into Equitas is ... designed to create a ‘firebreak’ between those liabilities and the continuing market. To reinforce this ..., the Council will prohibit the 1993 and later years of account of any syndicate from reinsuring liabilities of Equitas and from entering into any reinsurance of losses that could arise from or by reference to the proportionate cover provisions of the Reinsurance Contract Notwithstanding the existence of this ‘firebreak’, the continuing market will continue to be exposed in a number of ways to 1992 and prior liabilities.

“[T]he 1993 and later years of account” is error for “participants on SYAs budding in the 1993 and later UYs”: SYAs do not reinsure anything.

⁴⁴⁶ *SOD*, p.116.

⁴⁴⁷ See *SOD*, p.123-124.

⁴⁴⁸ See for example *SOD*, p.123-124.

⁴⁴⁹ See for example *SOD*, p.132.

⁴⁵⁰ See for example *SOD*, p.132.

⁴⁵¹ See *SOD*, p.123-124.

⁴⁵² Lloyd’s Act 1982, s.6(1).

⁴⁵³ See Reinsurance to Close (Restriction) Byelaw (No. 15 of 1993).

⁴⁵⁴ Relevant rulebook at Lloyd’s provisions are discussed at *Astor’s Law of Lloyd’s*, 2nd Ed.

⁴⁵⁵ See p.171.

⁴⁵⁶ See p.148.

from using the New Central Fund to pay any EquitasRe-insured liability. There appears to be no legal ground on which the Council is empowered to so decide; (2) the Council purporting to empower itself to not fund require essential contributions from Members to the New Central Fund to pay those liabilities. There appears to be no legal ground on which the Council is empowered to impoverish the Central Fund; (3) the Council purporting to empower Members — deprived by Lloyd's Act 1982 of their historical privilege of promulgating byelaws⁴⁵⁷ and having no power to promulgate regulations⁴⁵⁸ — in Corporation general meeting⁴⁵⁹ to control part of the “ringfence”, viz., to decide whether the New Central Fund does pay such liabilities. There appears to be no legal ground entitling the Council to delegate this statutory⁴⁶⁰ self-regulatory function to Members in that way, and none entitling Members in Corporation general meeting to pass any resolution contrary to the Corporation's objects, which necessarily include the payment of claims.⁴⁶¹

if the RRC 4, §3 product is reinsurance

3.52 Closely analogous⁴⁶² (if not identical in principle⁴⁶³) to the reinsurance sold to PCW-defrauded SYA⁴⁶⁴ participants⁴⁶⁵ by Lioncover,⁴⁶⁶ the RRC 4, §3 product is generally considered to be rein-

⁴⁵⁷ See Lloyd's Act 1982, s.15(1)(a)'s repeal of Lloyd's Act 1871, s.24 (power of Members in Corporation general meeting to make byelaws).

⁴⁵⁸ The regulation appears to be the sole preserve of the Council and its permitted delegate, the Committee: see Lloyd's Act 1982, s.6(6)(a)(i).

⁴⁵⁹ See p.131.

⁴⁶⁰ See generally Lloyd's Act 1982, s.6(1) and (2). The Council is the paramount self-regulatory body at Lloyd's, not Members in Corporation general meeting.

⁴⁶¹ See generally 7 Q.B. 433, 439, 446, 447; S.C. in error, 19 Law J. (N.S.) Q.B. 111.

⁴⁶² See for example RRC 19, recitals:-

(B) By a Whole Account Retrocession Contract dated 17 July 1987 (the 9001 Retrocession Contract), Lioncover agreed to reinsure Syndicate 9001 without limitation of liability against all liability arising in respect of the 9001 Contracts. The 9001 Retrocession Contract is treated by the Syndicate Accounting Byelaw (No. 18 of 1994) as reinsurance to close. (C) By an agreement dated 26 May 1987 (the Lioncover Bond), Lloyd's agreed with Lioncover that if the assets of Lioncover were insufficient to meet its liabilities Lloyd's would (i) pay to Lioncover a sum equal to such deficiency or (ii) discharge on behalf of Lioncover any liabilities of Lioncover. By an agreement dated 11 March 1988, Lloyd's agreed with Lioncover that the Lioncover Bond was intended to apply in respect of all liabilities of Lioncover. ... (M) Lloyd's, Lioncover and the 9001 Names have agreed that, subject to any necessary agreement by ERL and/or Equitas, as soon as practicable after the execution of this Agreement, they will make arrangements for the respective obligations of the 9001 Names under the 9001 Contracts and, if so agreed, of Lioncover under the 9001 Retrocession Contract to become the subject of novation and release.

And see *ibid.*, “Lloyd's guarantee and indemnity”:-

11.1 Lloyd's in consideration of ERL entering into this Agreement unconditionally and irrevocably, as a continuing obligation, guarantees the proper and punctual performance by Lioncover and SUM of all their respective obligations under this Agreement and undertakes to procure performance by Lioncover or SUM, as the case may be, of such obligations or to perform all such obligations on behalf of Lioncover or SUM, as the case may be, if and to the extent that Lioncover or SUM shall fail to perform such obligations and to pay ERL on demand, if Lioncover or SUM (as the case may be) fails to pay them, all amounts whatsoever which this Agreement provides are to be paid by Lioncover or SUM including any damages for misrepresentation, breach of warranty or other breach of contract. 11.2 Lloyd's liability hereunder shall not be discharged or impaired by:- (a) the existence or validity of any other security taken by ERL in relation to this Agreement or any enforcement of or failure to enforce or the release of any such security; (b) any amendment to or variation of this Agreement; (c) any release of or granting of time or any other indulgence to Lioncover or any third party; (d) any other act, event, neglect or omission which would or might but for this clause operate to impair or discharge Lioncover's liability hereunder. 11.3 Any release, compromise or discharge of the obligations of Lloyd's shall be deemed to be made subject to the condition that it will be void to the extent that any payment which ERL may receive or have received is set aside or proves invalid for whatever reason. 11.4 As a separate, continuing and ancillary obligation, Lloyd's undertakes to indemnify ERL on demand against all losses, claims or costs suffered or incurred by ERL should the amounts due under clause 11.1 not be recoverable for any reason whatsoever including (but not limited to) this Agreement being or becoming void, voidable or unenforceable. 11.5 The guarantee in this clause 11 is a continuing guarantee and is in addition to and not in substitution for any other security which ERL may now or hereafter hold for the obligations of Lioncover and SUM under the Agreement and may be enforced without ERL first having recourse to any such other security and without ERL first taking any steps or proceedings against Lioncover. 11.6 Lloyd's shall not, without first obtaining ERL's written consent: (a) prove in a liquidation or winding up of Lioncover or SUM in competition with ERL for any amount whatsoever owing to ERL by Lioncover or SUM, as the case may be, on any account whatsoever; or (b) in the event of a liquidation or winding up of Lioncover or SUM exercise any other right or remedy against that company in respect of any amount paid by Lloyd's under this clause 11 if that company has defaulted under this Agreement. 11.7 All amounts payable hereunder shall be made in full without any deduction or withholding whatsoever (whether in respect of set off, counterclaim, duties, taxes, charges or otherwise) which Lioncover or SUM, as the case may be, would not itself be entitled to make.

surance (query if it is 100% stop loss insurance⁴⁶⁷ or something other than insurance⁴⁶⁸). The following points bear on the RRC 4, §3 product as reinsurance:-

(1) mere reinsurance does not extricate: there is no doctrine in English law that a product purporting to be mere (however comprehensive⁴⁶⁹) outward reinsurance⁴⁷⁰ — “reinsured into Equitas”⁴⁷¹; “reinsurance into Equitas”;⁴⁷² “Equitas will reinsure those Names who are ... on open and closed 1992 and prior years of account in respect of all 1992 and prior business” — exonerates to any extent the reinsured in relation to the original assured,⁴⁷³ however generous the outward reinsurance premium, however much it may impoverish the reinsured and drain his reserves, and however bountifully the reinsurance contract may perform in due course. That premium is not equivalent to paying any claim and does not exonerate the EquitasRe-reinsured SYA participant from having to do so;

(2) reinsurer’s contractual performance irrelevant to liability: there is no doctrine that the outward reinsurer’s performance of the reinsurance contract (*a fortiori* one which expressly⁴⁷⁴ excludes the assured as a beneficiary) founds any right of set-off as between the reinsured or oth-

⁴⁶³ Whether or not fraud on the reinsured or outward-RTCd SYA participant is in issue, the Lloyd’s enterprise is liable for claims, not the reinsurer. If fraud is in issue, the Lloyd’s enterprise indemnifies the defrauded SYA participant. If it is not in issue, the Lloyd’s enterprise guarantees the liabilities of the reinsurer or RTC-source.

⁴⁶⁴ Per Byelaw 6 of 1987, Schedule 2, the syndicates are 59, 71, 73, 98, 99, 138, 157, 174, 175, 198, 246, 273, 277, 278, 346, 407, 408, 481, 482, 493, 494, 495, 515, 516, 540, 542, 574, 617, 618, 810, 811, 812, 813, 829, 830, 840, 841, 842, 844, 859, 869, 893, 894, 900, 914, 918, 930, 940, 948, 954, 970, 971, 972, 983, 986, 988 and 9001. Per *ibid.*, Sch. 2, the relevant years of account are generally 1967 to 1985. They are different, however, in four cases: for syndicate 138, 1967 to 1984 inclusive; for syndicate 495, only 1983; for syndicates 540 and 542, 1967 to 1983 inclusive): *ibid.*

⁴⁶⁵ One element present in the 9001 Retrocession Contract (as defined at RRC 19, recital (B)) which R&R did not consider — but which presumably may become relevant if the final appeal of the fraud defence and counterclaim rejected in *Lloyd’s v Jaffray* {2} [2000] CLC 725 (Cresswell J) is decided against relevant components of the Lloyd’s enterprise — is full indemnification by the Corporation of the outward-RTCd PCW SYA participants. That aside, the Lioncover RTC is substantially identical to the EquitasRe-RTC.

⁴⁶⁶ An authorised UK insurance company, Incorporated in England under the name Lioncover Limited; name changed to Lioncover Insurance Company Limited on March 30, 1987. Its share capital is £1,000: Memorandum of Association, §5. 100% owned by the Corporation: Corporation RA fye 1996, p.37 (Notes to the financial statements, note 21); Lioncover RA fpe December 31, 1987, p.3 (directors’ report; “principal activity and state of company affairs”). Per its Memorandum of association, §3(A)(1), its principal objects are:-

(a) to enter into and implement contracts of reinsurance — (i) of insurance and reinsurance business of Lloyd’s syndicates managed by or underwritten for PCW Underwriting Agencies Limited and / or Richard Beckett Underwriting Agencies Limited and / or WMD Underwriting Agencies Limited and / or P.E.J. Cameron-Webb or his appointed deputies and (ii) of any other insurance or reinsurance business of Lloyd’s syndicates which in the opinion of the Council of Lloyd’s is ancillary or related thereto — (b) to retrocede, reinsure, co-insure or counter-insure with any person, firm or corporation and on such terms as the Company may think fit any and all risks undertaken by the Company.

Paragraph (a) was adopted by special resolution on March 11, 1988 (replacing the text adopted by special resolution on March 31, 1987, which read: “To enter into and implement a whole account reinsurance contract or contracts with Lloyd’s of London Syndicate No. 9001 in terms to be agreed between such syndicate and [the] Company”); paragraph (b) was adopted by special resolution, March 31, 1987.

⁴⁶⁷ See for example *Toomey v Eagle Star* [1994] 1 Lloyd’s Rep. 516 (CA) on appeal from *ibid.* [1993] 1 Lloyd’s Rep. 429 (Judge Diamond QC). And see incidentally subsequently *Toomey v Eagle Star Insurance Co. Ltd.* (No. 2) [1995] 2 Lloyd’s Rep. 88, 89 (Colman J).

⁴⁶⁸ See p.A39.

⁴⁶⁹ Not even the 100% stop loss insurance considered in *Toomey v Eagle Star Insurance Co. Ltd.* [1994] 1 Lloyd’s Rep. 516 (CA) had that effect.

⁴⁷⁰ See for example *SOD*, *passim*.

⁴⁷¹ *SOD*, pp.6, 111, etc. “[I]nto” connotes RTC, not reinsurance, but see also *ibid.*, p.124 (“... it is proposed that Lioncover’s reinsurance liabilities will be reinsured ... into Equitas ...”).

⁴⁷² *SOD*, pp.6, 7.

⁴⁷³ Another reason why conventional RTC (which does comprehensively exonerate the conventionally outward-RTCd SYA participant) is not reinsurance.

⁴⁷⁴ See RRC 4, §3.7 and RRC 5, §2.6.

erwise bears on an EquitasRe-reinsured SYA participant's obligation to discharge his EquitasRe-reinsured liability gross;

(3) no requirement to look beyond the insuring enterprise: there is similarly no English legal rule that a surreptitiously created underclass of assured-at-Lloyd's must look directly to a SYA participant's reinsurer rather than to relevant components of the Lloyd's enterprise, *a fortiori* if the latter purports to conduct business as usual and the reinsurer avers its own impecuniosity.⁴⁷⁵ Concerning recourse to the Lloyd's enterprise, outward reinsurance (including by RRC 4, §3) does not generally operate in relation to, or relieve, any relevant common-use fund unless it expressly protects the common-use fund as such (as in the case of the Central Fund's outward "re-insurance"). Equitas Re's RRC 4, §3 performance allays only the EquitasRe-reinsured SYA participant's personal net liability and the exposure of his own personal-use funds (if any).

It follows that (to, in principle, the EquitasRe-assured's-at-Lloyd's financial benefit) nothing about Equitas Re or the RRC 4, §3 product *per se* prejudices the EquitasRe-assured's-at-Lloyd's recourse to the EquitasRe-reinsured SYA participant, *viz.*, to relevant personal-use and common-use funds in the ordinary way; that he can to that extent treat with RRC 4, §9 run-off-agent Equitas Re without on that ground needing to accept less than 100% of a valid claim; and that there is no point in him suing Equitas Re personally. Successfully arguing that the RRC 4, §3 product is assumption reinsurance may by definition have highly prejudicial claims payment securitisation consequences for the EquitasRe-assured-at-Lloyd's.⁴⁷⁶

if the RRC 4, §3 product is RTC

- 3.53** The RRC 4, §3 product has the incidental attribute, formally⁴⁷⁷ bestowed on it by the Council with the DTI's consent,⁴⁷⁸ of being a species of RTC, for the purpose of closing (of dire political necessity⁴⁷⁹) otherwise uncloseable accounts of relevant EquitasRe-reinsured SYA participants. RRC 4, §3 is virtually identical to a contemporaneous conventional RTC contract.⁴⁸⁰ There is no doctrine at Lloyd's that a product purporting (somewhat paradoxically⁴⁸¹) to be RTC⁴⁸² — "Equitas RITC",⁴⁸³ "Equitas will reinsure to close 1992 and prior business",⁴⁸⁴ "constitut[ing] rein-

⁴⁷⁵ And see for example Third Parties (Rights against Insurers) Act 1930, s.1(5): "For the purposes of this Act, the expression "liabilities to third parties", in relation to a person insured under any contract of insurance, shall not include any liability of that person in the capacity of insurer under some other contract of insurance."

⁴⁷⁶ See pp.84, 86.

⁴⁷⁷ see RRC 4, recital (F).

⁴⁷⁸ See RRC 4, §2.1(e).

⁴⁷⁹ See p.A5.

⁴⁸⁰ See for example the conventional RTC contract quoted in *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd's Rep. 618, 622 (Potter J):-

"IN CONSIDERATION of the payment to us of a sum of • the receipt of which amount we hereby acknowledge, we hereby undertake each for his own part and not one for another, to pay and make good in the proportions shown below against our respective Names all Claims, Returns, Reinsurance Premiums and the like taken down on and after 1st January [year], against the [UY] Underwriting Account of Syndicate • PROVIDED ALWAYS that there shall be paid to and retained by us all Premiums, Salvages, Refunds and Reinsurance Recoveries which may be taken down on behalf of the Reassured Account on and after the 1st January [year]."

⁴⁸¹ Strictly speaking, if the product is RTC, it cannot also be reinsurance since there is nothing to reinsure, unless the outward reinsurance notionally occurred before the outward RTC.

⁴⁸² See for example *SOD*, the then Corporation CEO's July 30, 1996 cover letter, p.iv; *SOD*, pp.1 ("the Equitas reinsurance (Equitas RITC)"); 6-7 ("Equitas RITC"); 37, 38, 111 ("The DTI has accepted that the reinsurance into Equitas can be treated as a reinsurance to close and that, having paid their finality bills, Names with no other outstanding Lloyd's liabilities may resign ... and cease to be members of the Society, *subject to there being no need to retain those names' membership for disciplinary purposes.*" — italics added; note the apparent indication that the self-regulatory connection is impaired on cessation of Membership); 116; 147 ("Equitas RITC"); App. 5, p.1 ("The Reinsurance Contract will be a reinsurance to close of the 1992 and prior liabilities of each syndicate ..."). On RTC generally, see p.207.

⁴⁸³ *SOD*, p.6, 7.

⁴⁸⁴ *SOD*, p.123.

surance to close as at the Inception Date”;⁴⁸⁵ “[Equitas Re] ... as reinsurer to close”⁴⁸⁶ — exonerates the *Lloyd’s* enterprise.

(1) the function of conventional RTC is to transfer liability from one SYA participant to another: the outward-RTCD SYA participant is utterly extricated, and the liability is utterly infiltrated into the inward-RTCing SYA participant. The transaction is irrelevant to the assured-at-Lloyd’s because any and every currently liable SYA participant is merely a conduit to relevant personal-use and common-use funds at the Lloyd’s enterprise;

(2) EquitasRe-RTC’s character should not be taken literally. Its effect is limited to enabling the EquitasRe-reinsured SYA participant to close his relevant accounts. This limitation makes EquitasRe-RTC materially different to conventional RTC. The latter retains the liability and therefore retains his character as a conduit to personal-use and common-use funds at Lloyd’s;

⁴⁸⁵ See p.A87.

⁴⁸⁶ RRC 4, §6.11, and see *ibid.*, recital (F)— RRC 4’s only references to RTC.

(3) keep the liability sealed into the Lloyd's enterprise regardless of each outward-RTCd and inward-RTCing SYA participant's personal and financial circumstances (none of which is disclosed to any assured-at-Lloyd's). RTC may be said to have the effect of preserving lindenstasis. The notion that EquitasRe-RTC infiltrates relevant liabilities into Equitas Re is based on a misunderstanding of this fundamental dynamic. Far from extracting the liability from the Lloyd's enterprise, RTC by definition cements it into the Lloyd's enterprise.

The RRC 4, §3 product's precise intra-contractual nature appears to be irrelevant⁴⁸⁷ to the EquitasRe-assured's-at-Lloyd's ability to sue the EquitasRe-reinsured SYA participant in the ordinary way, or to his recourse to relevant common-use claims payment securitisation funds at the Lloyd's enterprise. RTC is a technique, financially neutral to the assured-at-Lloyd's, whereby liability is preserved and discharged within the *Lloyd's* enterprise, each individual SYA participant of any RTC generation being (so far as concerns the front office) a mere (and usually anonymous⁴⁸⁸) conduit to relevant personal-use and common-use funds.

why, then, Equitas Re and RRC 4 in the first place?

- 3.54** The impossibility of self-exoneration merely by creating Equitas Re and devising RRC 4 — nor does RRC 4 effect novation or amendment of any EquitasRe-reinsured insurance contract — raises the question why such devices were contrived in the first place. RRC 4, §3's purpose was to effect RTC by a source other than SYA participants, *viz.*, to stop infiltration into the personal-use funds of individual SYA participants.⁴⁸⁹ Since any form of RTC entails establishing or preserving deep infiltration into common-use funds — which explains why conventional RTC is entirely neutral to the assured-at-Lloyd's — those liabilities, averredly mere reinsurance by an entity unconnected⁴⁹⁰ to the Lloyd's enterprise, necessarily remain firmly embedded in relevant common-use and other relevant funds of the Lloyd's enterprise.

if the Lloyd's enterprise, why not 100%?

- 3.55** Singularly, there appears to be no statute or common law applying specifically to the Lloyd's enterprise the propositions — equivalents of which are inherent in ordinary English insurance enterprises — that every insurance liability incurred at Lloyd's is payable at Lloyd's (rather than at the home address of any SYA participant or at the office of any SYA participant's outward reinsurer), and at 100% rather than at any lesser percentage (Equitas Re appears to have a policy of offering to pay valid claims under valid insurance contracts at 37%⁴⁹¹). The Lloyd's enterprise could not function otherwise. A curious indication in *SOD*⁴⁹² notwithstanding, no EquitasRe-reinsured SYA participant himself, and therefore neither any common-use claims securitisation fund at Lloyd's, has any equivalent means to revise downward his liability to any EquitasRe-assured-at-Lloyd's, *a fortiori* the more the Lloyd's enterprise asseverates that it and Equitas Re are wholly unconnected. For example: (1) the Lloyd's enterprise has no proportionate cover or other device in place enabling it to recalibrate any insurance contractual liability, including one reinsured by Equitas Re. In any event, there is no indication anywhere in any R&R document, including *SOD*, that R&R was overtly designed to reduce the figure — *viz.*, 100% — at which

⁴⁸⁷ See pp.149, 151.

⁴⁸⁸ The assured-at-Lloyd's is, generally, rarely if ever made aware by any component of the Lloyd's enterprise of whose PTF or other personal-use fund funds the payment of his claim; nor is such fact of any relevance to him.

⁴⁸⁹ See similarly, pre-R&R, Reinsurance to Close (Restriction) Byelaw (No. 15 of 1993).

⁴⁹⁰ See p.5.

⁴⁹¹ See p.84.

⁴⁹² See for example *SOD*, p.112 (PPP will "benefit Names, in that they would avoid the obligation of having to pay the full amount of their liabilities if Equitas were forced to cease paying claims"). See apparently to the opposite effect *SOD*, p.113 ("Names who continue to underwrite at Lloyd's must ... appreciate that, if Equitas were to fail or invoke proportionate cover, their premiums trust funds and funds at Lloyd's will continue to be available to make good any shortfall on their individual 1992 and prior liabilities").

any valid claim would be paid at Lloyd's; (2) there is at Lloyd's no sliding scale of recourse, no express qualification in any securitisation fund governing instrument that it is not 100%, and no multiplicity of classes of assured-at-Lloyd's classified by recourse percentage; (3) the Lloyd's enterprise represents to assureds-at-Lloyd's a "common security" paying out uniformly 100% regardless of any differentiating circumstance, including reinsurance by Equitas Re. Self-regulators-at-Lloyd's appear to have recognised the principle in *SOD*: "If Equitas is unable to pay the 1992 and prior liabilities in full, the Society will be liable to meet *any* shortfall arising in respect of these policies."⁴⁹³ (4) even assuming that the 90% Central Fund indemnity presently ventured⁴⁹⁴ by the FSA is *intra vires*, that lesser amount necessarily applies only to an insolvency of the entire enterprise (in which event 90% will not⁴⁹⁵ be feasible in the first place; nor is it feasible in any event to the extent that the necessary New Central Fund contributions are voluntary); (5) R&R's settlement and EquitasRe-RTC components are merely larger-scale versions of the Lioncover transaction: it would have been appropriate for the Corporation to have expressly indemnified Equitas Re in the same way (and for the same reasons) as it continues to indemnify Lioncover.

generally

solvent or insolvent repudiation requires due process: no surreptitious underclass

3.56 The Lloyd's enterprise appears to have no legal basis for seeking to wholly or partly repudiate EquitasRe-reinsured liabilities. For example:-

(1) no statute or common law empowers or invites self-regulators-at-Lloyd's, or any external insurance regulator, to discriminate adversely, by any device and on any ground, between any assured-at-Lloyd's while the Lloyd's enterprise purports to be solvent and conduct itself as a going concern;

(2) no provision of English law exempts any solvent or insolvent component of the Lloyd's enterprise from ordinary English insolvency law, or permits or invites it unilaterally, without notice and without due process to repudiate, by any percentage, any insurance liability incurred at Lloyd's, or otherwise to act extra-legally, *a fortiori* since the Council appears to have expressly acknowledged the Lloyd's enterprise's liability for every EquitasRe-reinsured liability, and to the extent that the Lloyd's enterprise has not yet retracted representations made when business was apparently going well to members of the putative underclass as to the munificence of securitisation at Lloyd's. The proposition is *a fortiori* to the extent that the Lloyd's enterprise disclaims⁴⁹⁶ all formal connection with the Equitas enterprise (*a fortiori* if the latter is impecunious), continues to do business as usual, and implements none of the steps⁴⁹⁷ required to properly create an underclass of assured-at-Lloyd's. It is not irrelevant that (for example) in approving Equitas Re, the DTI did not expressly remove any element of any "chain of security", or put in place any extrinsic compensation fund. Full compensation would have been especially stipulated by certain US state insurance regulators; that no EquitasRe-assured-at-Lloyd's appears to have been notified by self-regulators-at-Lloyd's or any external insurance regulator that recourse to the Lloyd's enterprise has been removed or limited; and that the New Central Fund Byelaw expressly alludes to EquitasRe-reinsured liabilities;

(3) neither self-regulators-at-Lloyd's, nor Equitas Re, nor any external insurance or other regulator has notified any EquitasRe-assured-at-Lloyd's that his claim will be paid at less than 100%,

⁴⁹³ *SOD*, p.123-124. Italics added.

⁴⁹⁴ See p.143.

⁴⁹⁵ The Council appears to have no self-regulatory mechanism in place to ensure 90%.

⁴⁹⁶ See p.5.

⁴⁹⁷ See p.157.

that his recourse to the Lloyd's enterprise has been curtailed,⁴⁹⁸ that the Lloyd's enterprise harbours a surreptitious underclass of assured-at-Lloyd's in relation to a valid claim; or that he is in any other way set apart adversely from any other assured-at-Lloyd's;⁴⁹⁹

(4) presumably only sound legal grounds would suffice for such repudiation consonant with its asseveration that the Lloyd's enterprise is solvent and with "chain of security" original and continuing representations. Presumably resiling from such obligations could be only on the grounds of insolvency, in which event no fresh insurance contracts could be made at Lloyd's: insufficient assets in the relevant fund leads not to that (or any other) fund's exoneration in relation to the particular relevant liability but in effect⁵⁰⁰ (or implicitly⁵⁰¹) to the Lloyd's enterprise ceasing to do business altogether. All relevant assets would have to be marshalled and distributed as in any other insolvency, the process⁵⁰² involving all relevant assureds-at-Lloyd's and all relevant assets of the Lloyd's enterprise and public notices in the ordinary way. None of the foregoing has occurred, and self-regulators-at-Lloyd's appear to have done nothing to disabuse any assured-at-Lloyd's — including any EquitasRe-assured-at-Lloyd's, of the impression that his claim will be paid 100% at Lloyd's in the ordinary way. Merely unilaterally creating, for its own private protection, an *ex post facto* reinsurance company, engineering that Lloyd's brokers broke EquitasRe-assureds'-at-Lloyd's claims at Equitas Re rather than at AUA 9 or at the Council secretariat, is not a lawful means of repudiating liability.

no repudiation if a going concern and purportedly solvent

- 3.57** There is no doctrine in English law permitting or inviting an insurance undertaking — in this case the Lloyd's enterprise — purporting to be solvent and trading as a going concern to adjust its liabilities downwards. Nor would there be any reason to do so.

no repudiation by self-improvement or for political convenience

- 3.58** In RRC 1, self-regulators-at-Lloyd's and relevant members' and managing agencies have deprived themselves of recourse to RRC 1 Accepting Names by various RRC 1 releases⁵⁰³ and waivers. By various express undertakings, the Council has sought to deprive itself of certain Central Fund contributions from some underwriting Members. There is no doctrine in English law permitting or inviting any creditor to exonerate itself of its debts merely by putting itself in the position of being unable to pay them. In any event, those undertakings appear to be of a purely political, rather than a legitimate self-regulatory, character and probably *ultra vires*.⁵⁰⁴ How, if at all, the Lloyd's enterprise chooses to enable itself to pay an assured-at-Lloyd's — including by putting itself under financial pressure to the extent of the release, and must fund relevant insurance liabilities as best it can from other sources, including (for example) existing relevant dedicated common-use funds and, in the future, Central Fund contributions from Members (if any) willing to make them — is a back-office matter in which no assured-at-Lloyd's can practicably take any interest or have any role.

⁴⁹⁸ Including that the New Central Fund is expressly not available generally to pay his claim: see p.129.

⁴⁹⁹ On the importance of notifying creditors in the context of a Companies Act 1985, s.425 scheme of arrangement — it has been said that RRC 4, Sch. 3 amounts to a pre-approved scheme of arrangement in relation to EquitasRe-assureds-at-Lloyd's — see recently for example *Re Osiris Insurance Ltd.* [1999] 1 BCLC 182, 191 (Neuberger J).

⁵⁰⁰ And see incidentally Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.4 etc; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.4 etc.

⁵⁰¹ As in the case of the Central Fund.

⁵⁰² When devising R&R, self-regulators-at-Lloyd's and others gave detailed attention to some likely events were the Lloyd's enterprise to be regulatorily regarded as no longer a going concern. The enterprise would stop selling insurance; confine itself to running off its existing liabilities: See for example *SOD*, p.135 etc. ("Run-off alternative").

⁵⁰³ See p.169.

⁵⁰⁴ See p.136.

another possible basis of recourse: damages for misrepresentation orientation

- 3.59 The Lloyd's enterprise has long⁵⁰⁵ expressly and unambiguously represented⁵⁰⁶ to potential and actual assureds-at-Lloyd's — presumably to induce the purchase of insurance at Lloyd's rather than elsewhere, and with the purpose of generating “profits”⁵⁰⁷ for SYA participants — that every valid insurance claim on a “Lloyd's policy” is payable at Lloyd's 100%. Self-regulators-at-Lloyd's themselves appear to take those representations seriously and are aware of their regulatory significance.⁵⁰⁸ In relation to EquitasRe-reinsured liabilities, not all those representations are true: the New Central Fund is not⁵⁰⁹ ordinarily available, and may be designedly insufficient,⁵¹⁰ to pay any part of any EquitasRe-reinsured liability. Recent advertising material appears to be profoundly infelicitous.⁵¹¹ However infelicitous, the circumstances in which an assured-at-Lloyd's would need ordinarily to recourse to the Corporation⁵¹² are remote: relevant

505 See for example *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J), the judge expressing disquiet about false statements in sales propaganda published by self-regulators-at-Lloyd's without deciding — because the plaintiff assured's-at-Lloyd's claim happened in that case to have been fraudulent (*ibid.*, 83) — what he said was a very difficult point (the defendant Corporation pleaded (at *ibid.*, 79) that the literature was not an offer to the plaintiff assured-at-Lloyd's).

506 See p.118 *et seq.*

507 Profits are by definition illusory in an apcorollic business, of which the Lloyd's enterprise is a good example.

508 See for example the Corporation's then Head of Strategy (and present CEO) at *New York Law School Center for International Law Symposium — Implications of the Reconstruction of Lloyd's of London*, November 6, 1996 (found at www.nyls.edu/CIL/lloyds.htm, July 25, 2001):-

[p.8 of 28] Our Reconstruction and Renewal program was formulated in response to twin problems of liabilities and litigation. ... We believe Equitas to be a strong and well-reserved company that will offer policyholders the benefits of expert claims handling and a properly capitalized balance sheet. ... As a result of the Reconstruction we have a new Lloyd's market which retains the historic expertise but is free of past liabilities and costs. It has secure assets, and it is free from the cloud of litigation that so got in the way of sensible commercial thinking. ... Before the Reconstruction, we had a very weak balance sheet indeed; now we have one that can compete in a world where financial security and strength is a paramount consideration to our clients and policyholders. ... [p.11-12 of 28] ... [W]e need to do everything that we can to make our chain of security and the security that we offer to our policyholders as transparent and as strong as possible. ... We have a strong commitment to a basic level of collective security. It is extremely important for Lloyd's licensing position internationally and our commercial credibility in retaining the absolute commitment of our policyholders. Anybody who is insuring with Lloyd's has to get paid so we have to maintain our system, of collective security, not just by relying exclusively on mutualized assets like our Central Fund, but by making sure that our whole chain of security offers the highest quality of security to our policyholders. ... [p.17 of 28] [T]he primary feature of the establishment of Equitas from a claims-handling standpoint is the creation of centers of excellence and those particularly dealing with asbestos and pollution and health hazard claims. The idea that those sort of claims, which present huge technical difficulties, could be handled in a commercially sensible and responsible way by a fragmented collection of over 700 businesses was, I think, a little difficult to imagine. So the creation of centers of excellence to think about those claims and to deal with them in a consistent and expert way seems to me a good thing from the every standpoint, not least that of the policyholder.

509 See p.129 *et seq.*

510 See p.136 *et seq.*

511 See for example the advertisement in *Financial Times*, March 20, 2001, p.17:-

More than 1300 individual underwriters write insurance at Lloyd's of London. The competition of the marketplace guarantees clients keenness of pricing and flexibility of cover. And with 62% of our capital provided by major international insurers, Lloyd's is firmly positioned at the heart of the global insurance industry. Lloyd's[.] www.lloydsolondon.com[.]

Infelicities include (for example): (1) the number of active underwriters (what the advertisement mistakenly calls “underwriters”) is irrelevant to the quality of the insurance product or the funds securitising payment of claims; (2) “62% of our capital” refers to such corporate Members' PILs, not the assets of any part of the Lloyd's enterprise; (3) whether a corporate Member's assets suffice to meet its relevant Participation Liabilities is an entirely different matter, especially since there is no self-regulatory, legal, commercial or other necessary relationship or other connection between that PIL and those liabilities; (4) in any event, a corporate Member's personal-use funds are not common-use funds or the property of the Lloyd's enterprise; (5) because of the personal-use and common-use funds distinction at Lloyd's, ascertaining which funds are available to pay which claims can be complicated.

512 Historically, pre-incorporation, see *Lloyd's v Harper* (1880) 16 Ch.D. 290, 303 (Fry J):-

[I]n the year 1863 Lloyd's was a voluntary society or club constituted under a deed of 1838, which referred to an earlier deed of 1811, and, according to the terms of that deed, each person who became a member of Lloyd's contracted to observe all the by-laws and regulations for the time being in force in respect of that society, and further contracted to indemnify the managing committee of the society against any loss they might incur in that capacity.

The judge may be referring to unnumbered seventh paragraph in the 1838 trust deed (the deed is reproduced in full in this Edition, Appendix 1):-

available personal-use and common-use funds will be deployed in the ordinary way. To the extent that such recourse is not available to the EquitasRe-assured-at-Lloyd's, presumably the latter may sue the Corporation — which has unlimited liability for its own debts (but apparently maintains no separate contingency fund to pay damages) — for damages for misrepresenting (for example) the quality of securitisation at Lloyd's. The Corporation's Lloyd's Act 1982, s.14⁵¹³ limited exemption (usually mythologised as an immunity) from having to pay damages does not apply when it is sued (whether or not for fraud⁵¹⁴) by any person outside the "Lloyd's community".⁵¹⁵ English⁵¹⁶ courts appear to have striven to protect the Corporation from liability to litigants belonging to the "Lloyd's community". *Industrial Guarantee* appears to be the only English case in which the Corporation's personal liability to an assured-at-Lloyd's on an insurance transaction made with Members has been considered.

Industrial Guarantee Corporation v Lloyd's

- 3.60** The legal effect of the Lloyd's enterprise's public inducements to potential and actual assureds-at-Lloyd's appears never to have been decided by an English court. In *Industrial Guarantee Corporation v Lloyd's*,⁵¹⁷ the court considered a pamphlet — not dissimilar to recent "chain of security" publicity — published by the Lloyd's enterprise as an inducement to buy insurance at Lloyd's, which proclaimed, "It has justly been said that Lloyd's has solved the problem of combining individual energy, enterprise and initiative with the *collective security of a corporate*

Provided always, that if it shall at any time hereafter happen, that the whole of the funds, or monies vested or to be vested in the Trustees, shall be voted away by a majority of two General Meetings, or paid by the Trustees for the use, or by the direction of the Subscribers for the time being, or there shall be no sufficient funds remaining in the hands of the said Trustees, then and in either of such cases, the Subscribers do hereby severally and respectively covenant, promise, and agree, with the said Joseph Marryat, Horatio Clagett, Robert Shedden, and Joshua Reeve, to indemnify them, their executors, administrators, and successors, for the time being, against all loss, costs, and charges, they, or any of them, may be put unto for or by reason of their or either of their having entered into any contract, covenant, or agreement, or incurred any liability for the use, or by the authority of the said Society[.]

- ⁵¹³ Lloyd's Act 1982, s.14:-

14. (1) This section shall only exempt the Society from liability in damages at the suit of a member of the Lloyd's community. (2) For the purposes of this section a member of the Lloyd's community shall be — (a) a person who is — (i) a member of the Society; (ii) a Lloyd's broker; (iii) an underwriting agent; (iv) an annual subscriber; (v) an associate; (vi) a director or partner of a Lloyd's broker or an underwriting agent; (vii) a person who works for a Lloyd's broker or underwriting agent as a manager; or (b) a person who has been a member of the Lloyd's community in one or more of the capacities listed in paragraph (a) above; or (c) a person who is seeking or who has sought to become a member of the Lloyd's community in one or more of the capacities listed in paragraph (a) above. (3) Subject to subsections (1), (4) and (5) of this section, the Society shall not be liable for damages whether for negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 or any byelaw or regulation made thereunder — (a) in so far as the underwriting business of any member of the Society or the costs of his membership or the business of any person as a Lloyd's broker or underwriting agent may be affected; or (b) in so far as relates to the admission or non-admission to, or the continuance of, or the suspension or exclusion from, membership of the Society; or (c) in so far as relates to grant, continuance, suspension, withdrawal or refusal of permission to carry on business at Lloyd's as a Lloyd's broker or an underwriting agent or in any capacity connected therewith; or (d) in so far as relates to the exercise of, or omission to exercise, disciplinary functions, powers and duties; or (e) in so far as relates to the exercise of, or omission to exercise, any powers, functions or duties under byelaws made pursuant to paragraphs (21), (22), (23), (24) and (25) of schedule 2 to this Act; unless the act or omission complained of — (i) was done or omitted to be done in bad faith; or (ii) was that of an employee of the Society and occurred in the course of the employee carrying out routine or clerical duties, that is to say duties which do not involve the exercise of any discretion. (4) Nothing in this section shall affect the liability of the Society in respect of the death of or personal injury to any person, and for the purposes of this section the expression "personal injury" means bodily injury, any disease and any impairment of a person's physical or mental condition. (5) Nothing in this section shall exempt the Society from liability for libel or slander. (6) For the purposes of this section "the Society" means the Society itself and also any of its officers and employees and any person or persons in or to whom (whether individually or collectively) any powers or functions are vested or delegated by or pursuant to Lloyd's Acts 1871 to 1982.

- ⁵¹⁴ Cf. Lloyd's Act 1982, s.14(3)'s fraud exception in relation to suits brought by members of the *ibid.*, s.14(2)-defined "Lloyd's community".

- ⁵¹⁵ See Lloyd's Act 1982, s.14(1) and *ibid.*, s.14(2)(a) (definition of "Lloyd's community"; the category includes any current or past Member).

- ⁵¹⁶ See for example *Ashmore v Lloyd's (No. 2)* [1992] 2 Lloyd's Rep. 620 (Gatehouse J) (and see incidentally *ibid.* (No. 1) [1992] 2 Lloyd's Rep. 1 (HL)); *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176 (QB Div. Ct.); and see *ibid.*, unreported, May 22, 1992 (QB Div. Ct.); *Lloyd's v Jaffray* {2} Court of Appeal, July 26, 2002 on appeal from [2000] CLC 725 (Cresswell J).

- ⁵¹⁷ (1924) 19 Lloyd's List Law Reports 78 (Bailhache J). And see incidentally *Rozanes v Bowen* (1928) 32 Lloyd's List Law Reports, 98 (CA); *Portavon Cinema Co. Ltd. v Price and Century Insurance Co. Ltd.* [1939] 4 All ER 601.

body. From this you will realize that Lloyd's is the largest insurance institution in the world."⁵¹⁸ The defendant Corporation pleaded⁵¹⁹ (presumably solely in the contractual context) that the literature was not an offer to the plaintiff assured-at-Lloyd's. The judge found that the pamphlet contained statements "some of which, I think, might be calculated to mislead",⁵²⁰ and which "ought not to be in the pamphlet",⁵²¹ and "[t]here are one or two statements in that pamphlet which certainly cannot be supported",⁵²² but held that the Corporation's personal liability had to be decided "upon what is the true effect of the whole pamphlet; and I do not decide it because in this case it is not necessary".⁵²³ The Central Fund was created three years later.⁵²⁴

Sub-chapter 3: recourse outside the Lloyd's enterprise

RECOURSE TO EQUITASRE-REINSURED SYA PARTICIPANTS PERSONALLY

orientation

two categories of SYA participant

3.61 EquitasRe-reinsured SYA participants can for present purposes be divided into two categories:-

(1) EquitasRe-reinsured SYA participants. EPs 1, 3 and 5 can usually be treated together since they are no longer Members (although they appear to remain potentially within self-regulators' at Lloyd's self-regulatory jurisdiction), and no longer hold or are required to hold any captive assets. EPs 2, 4, 6 and 7 fall to be treated together since they continue to be Members and therefore fully within self-regulators' at Lloyd's self-regulatory jurisdiction, which jurisdiction is highly relevant to the visitation upon them of liabilities which were EquitasRe-reinsured in RRC 4 and in relation to which the EP 2, 4 or 6 thought he had been exonerated. EP 2, 4, 6 or 7 is a Member and continues to have FAL. R&R was premised on the political desirability of creating a "ring fence"⁵²⁵ or "fire break"⁵²⁶ between RRC 4 "1992 and Prior Business" and current Members, both as Members contributing to an increasingly indebted Central Fund and as increasingly re-

⁵¹⁸ (1924) 19 Lloyd's List Law Reports 78, 78; italics added.

⁵¹⁹ See (1924) 19 Lloyd's List Law Reports 78, 79 (Bailhache J).

⁵²⁰ (1924) 19 Lloyd's List Law Reports 78, 83 (Bailhache J).

⁵²¹ (1924) 19 Lloyd's List Law Reports 78, 83 (Bailhache J).

⁵²² (1924) 19 Lloyd's List Law Reports 78, 82 (Bailhache J).

⁵²³ *Ibid.*, 82-83 (Bailhache J):-

If I had to consider this question: what meaning does the pamphlet issued by Lloyd's Committee convey to a person who knows nothing about the business of Lloyd's and is making up his mind whether he shall insure with Lloyd's or whether he shall insure with the companies? and if I were asked whether a person reading that pamphlet in that way would reasonably suppose that the Committee of Lloyd's stated there and offered that if he would insure with Lloyd's the Corporation of Lloyd's would be answerable for his insurances, and whether his underwriters paid or not they would, I should consider the question a question of very great difficulty. There are one or two statements in that pamphlet which certainly cannot be supported. There is the statement, for instance, that there is individual initiative together with corporate liability. There is no corporate liability. There is a statement that the premium income of Lloyd's is now £30,000,000 a year. As a matter of fact, Lloyd's have no premium income at all. They have not £30,000,000 or thirty pence of premium income. Those two statements ought not to be in that pamphlet, and there are others which, I think, might be calculated to mislead, and if I were on the Committee of Lloyd's, as I am sorry I am not, one of the first things I should do would be to withdraw this pamphlet and to recast it and to take out from it the statements which to my mind are misleading. I am not, however, driven to decide the question what is the right view to take if a person knowing nothing about it had had that pamphlet put into his hands to assist him to decide whether he should insure with Lloyd's or with one of the companies. That, I think, is a difficult question which would have to be decided, not on the one or two erroneous statements in it but upon what is the true effect of the whole pamphlet; and I do not decide it because in this case it is not necessary. I do not decide it because I do not regard the claim in this case as an honest claim.

⁵²⁴ Central Fund Agreement, May 18, 1927.

⁵²⁵ Various R&R documents emitted by self-regulators-at-Lloyd's.

⁵²⁶ See for example *SOD*, p.149.

calcitrant corporate and natural SYA participants selling conventional inward-RTC of unquantifiable liabilities;

(2) others. Of this group, none is liable to pay any EquitasRe-reinsured liability. His liability as a Member to contribute to the Central Fund (a not- dedicated common-use fund) is considered elsewhere.⁵²⁷ His liability as a SYA participant to contribute to relevant dedicated common-use funds is considered elsewhere.⁵²⁸ *Per* Lloyd's Act 1982, s.8(1), he cannot be required as a SYA participant or Member to directly pay the insurance liability of any particular SYA participant. Byelaws prevent him from selling any insurance or reinsurance product to Equitas Re.⁵²⁹

⁵²⁷ See p.135.

⁵²⁸ See *Astor's Law of Lloyd's*, 2nd Ed.

⁵²⁹ See *Astor's Law of Lloyd's*, 2nd Ed.

- the SYA participant's front-office liability: Lloyd's Act 1982, s.8(1)
- 3.62** *Per* the SYA-level separate contracts rule,⁵³⁰ the assured-at-Lloyd's enjoys one insurance contract with each subscribing SYA participant. *Per* Lloyd's Act 1982, s.8(1)⁵³¹ (part⁵³² of the SYA-level several liability rule), the SYA participant (including the EquitasRe-reinsured SYA participant⁵³³) is liable to the assured-at-Lloyd's only for no⁵³⁴ less than 100% of his own insurance contractual liability, and is not severally, jointly or jointly-and-severally⁵³⁵ liable on an insurance contract made by a participant on the same or any other SYA. It is reflected in LPSO policy boilerplate ("... for himself and not one for another ..."; misleading to the extent that it gives no clue as to the extent and availability of common-use funds). The SYA participant's managing agency has no power (even if so ordered by a court in another jurisdiction) to, and under English law would act actionably if it did, engineer that participants on a particular slip sold insurance with joint liability.
- the back office at Lloyd's generally
- 3.63** Invariably at Lloyd's, the assured-at-Lloyd's never collects against any SYA participant. Requiring the SYA participant — or, in default, the Central Fund — to provide relevant personal-use funds at the earliest moment, the back-office parallel contracts system at Lloyd's thus ensures that the assured-at-Lloyd's never knows and never needs to know whether, when or to what extent any SYA participant's personal-use claims payment securitisation funds become insufficient to pay a claim, insulates him from relevant stamp cashflow difficulties, and obviates the need for him to ever enforce any relevant judgment directly against any SYA participant personally. In any event, the burden on the assured-at-Lloyd's to collect against each individual

⁵³⁰ An insurance transaction at Lloyd's is notionally effected by the assured-at-Lloyd's entering into one insurance contract with each individual subscribing SYA participant separately, exclusively and directly. A purpose of an insurance policy issued by LPSO (or, recently Xchanging) is to evidence one particular insurance transaction's separate insurance contracts. The rule has been comprehensively ignored in US coverage litigation against syndicates; there is bizarre US federal jurisprudence on diversity jurisdiction over syndicates. In other ways the rule is plausible but unsatisfactory. Very little indeed at Lloyd's hangs on an individual insurance contract, and numerous aspects of business at Lloyd's render it irrelevant or its observance utterly impracticable.

⁵³¹ And see RRC 4, §5.7, first sentence. Lloyd's Act 1982, s.8(1) drafting defects include: (1) only the risk, not the contract, is underwritten; (2) the *risk* is not underwritten with several liability: the SYA participant *assumes* several liability; (3) the sub-section applies to insurance contracts written by the SYA participant himself, not by others; (4) the sub-section is tautologous: several liability imports both "each for his own, not one for another" and "solely for his own account". Breach of the sub-section is — illogically because of the passivity rule — capable of giving rise to disciplinary proceedings: see Lloyd's Act 1982, s.8(4); Byelaw 30 of 1996, §3(a).

⁵³² The Rulebook at Lloyd's happens to take a similar approach in relation to the Member's other liabilities: see for example in relation to EquitasRe-reinsurance premium, RRC 4, §5.7, first sentence ("The obligation of each Name to pay his Name's Premium shall be several and not joint").

⁵³³ See RRC 4, recital (J) ("The liability of the relevant Names or Closed Year Names under all contracts of insurance underwritten by them shall remain several and not joint").

⁵³⁴ No EquitasRe-reinsured SYA participant himself, and therefore (absent express provisions in its governing instrument) no personal-use or common-use claims securitisation fund at Lloyd's, has any means equivalent to Proportionate Cover Plan to revise downward the quantum of any insurance liability, whether by mere outward reinsurance (which does exist) or some supposed proportionate cover device (which does not exist) inherent in insurance sold at Lloyd's. But see the apparent contrary indication at *SOD*, p.112:-

A proportionate cover plan would enable Equitas to continue paying a proportion of policyholder claims if it were ever confronted with a shortfall of assets and would enable Equitas to avoid the cessation of claims payment which would otherwise follow if Equitas were forced into insolvency. This procedure will also benefit Names, in that they would avoid the obligation of having to pay the full amount of their liabilities if Equitas were forced to cease paying claims.

To the extent that this purports to indicate an entitlement of the Lloyd's enterprise to renege on "chain of security" claims payment securitisation it is, of course, wholly groundless.

⁵³⁵ UK insurance premium tax is a notable example: see Insurance Premium Tax Regulations 1994 (1994 SI 1774), §9:-

(1) Anything required to be done by or under the Act [*viz.*, Finance Act 1994, Part III: *regs. cit.*, §2(1)] (whether by these Regulations or otherwise) by or on behalf of a syndicate of underwriting members of Lloyd's shall be the joint and several responsibility of the persons mentioned in paragraph (2) below; but if it is done by any of those persons it shall be sufficient compliance with any such requirement. (2) The persons are — (a) the underwriting members of the syndicate; (b) the managing agent of the syndicate; and (c) as regards any accounting period for which it is required by paragraph (3) below to act as the syndicate's representative, Lloyd's.

"Syndicate" is not defined in the Regulations. Its meaning in this context is obscure.

relevant SYA participant would be excessive.⁵³⁶ Ordinarily at Lloyd's, the SYA participant is, similarly, rarely if ever called upon to fund a particular insurance contract: the administrative burden on the managing agency would be excessive. Rather, the underwriting Member, in various capacities, is under a variety of miscellaneous back-office funding obligations⁵³⁷ (apparently not always necessarily related to his insurance liabilities⁵³⁸) including (for example): (1) to fund (as a SYA participant) his PTF-premium and other relevant personal-use⁵³⁹ funds — in relation to the totality of all of the liabilities on each of his SYAs — whenever each is deemed by a relevant managing agency to be insufficient for any reason. Each of his managing agencies determines and quantifies the insufficiency (initially expressed in the form of an open-YA cash call or a closing-YA cash call) based on relevant financial requirements and administrative convenience, often irrespective of how much the SYA participant happens to owe on any one particular insurance contract; (2) to provide a Lloyd's deposit; (3) to contribute to common-use funds (as a SYA participant); (4) to contribute to the Central Fund (as an underwriting Member). Since no assured-at-Lloyd's is party to any relevant back-office instrument — such as the PTD, the Lloyd's deposit trust deed, the New Special Reserve Trust Deed, etc. — he cannot easily enforce any incidental liability, even assuming the liability could be related to his particular relevant insurance contracts, and he would in any event encounter the back-office equivalent of the separate contracts rule and the absence of an aggregation device. No mechanism exists at Lloyd's whereby the potential or actual assured-at-Lloyd's is informed of the condition of any particular SYA participant's personal-use funds;⁵⁴⁰ not even the SYA participant himself necessarily knows the

⁵³⁶ See p.165.

⁵³⁷ The liable (*cf.* the conventionally outward-RTCd) SYA participant is subject to an entirely separate, additional, parallel, co-existing contractual liability, *in relation to the same insurance liability*, to his members' agency (in accordance with relevant provisions of SMA 2 or similar), each of his managing agencies (in accordance with relevant provisions of SUA 1 / SCA 1 or similar) and the Corporation (in accordance with relevant provisions of the Lloyd's deposit trust deed (insufficiency of the Member's Lloyd's deposit) or in accordance with Old Central Fund Byelaw and New Central Fund Byelaw provisions entitling the Corporation to sue the SYA participant for reimbursement of Central Fund disbursements.). It was in relation to these back-office contractual commitments that the EquitasRe-reinsured SYA participant was comprehensively released in RRC 1). For example, SUA 1 / SCA 1 empowers the SYA participant's managing agency (its internal accounts having detected insufficient personal-use claims payment securitisation funds at an early stage) to make SYA-level cash calls (see *Marchant & Eliot Underwriting Ltd. v Higgins* [1996] 2 Lloyd's Rep. 31 (CA) on appeal from [1996] 1 Lloyd's Rep. 313 (Rix J); *Boobyer v David Holman & Co. Ltd. and Lloyd's (No. 2)* [1992] 1 Lloyd's Rep. 96 (Saville J)); and the Lloyd's Deposit Trust Deed empowers the Corporation to require the SYA participant to fund his Lloyd's deposit, and Old Central Fund Byelaw and New Central Fund Byelaw entitle the Corporation to sue the SYA participant for reimbursement of Central Fund personal-use float disbursements — all in relation to (among others) conventionally inward-RTCd liabilities, never in relation to conventionally outward-RTCd liabilities. The extensive network of common-use funds at Lloyd's is activated, rather than annulled, by the insufficiency of personal-use funds. Personal-use funds ameliorate exposure of relevant common-use funds.

⁵³⁸ The SYA participant is also irrelevant to securitisation to the extent that self-regulators-at-Lloyd's set his FAL irrationally, without taking into account his ultimate net liability. The minimum level of a Member's Lloyd's Deposit has traditionally been determined — and the minimum level of every EquitasRe-reinsured SYA participant's Lloyd's Deposit was determined — by self-regulators-at-Lloyd's working backwards from the OPIL which he wished in each relevant UY to be assigned by the Council rather than according to rules which maturely assessed his actual ultimate net liability on a particular insurance contract. Absent a rational connection between premium and ultimate net liability in the case of a sufficient number of insurance contracts at a sufficient number of managing agencies, an underwriting Member's Lloyd's Deposit is sufficient only by coincidence, thus exposing the Central Fund. It is believed that a considerable number of EquitasRe-reinsured SYA participants were required in their R&R "finality statement" to provide fresh money of a level materially larger than in their then-existing FAL.

⁵³⁹ Every SYA participant ordinarily at Lloyd's is self-regulatorily required to maintain a variety of personal-use funds, which are held captive at Lloyd's, usually in trust. They include (for example) the PTFs (premium component and personal reserve component), the Lloyd's Deposit (governed by trust deed), and (for example) such US trust funds as US Corporate Instrument Fund, US Natural Instrument Fund, LATF, US Credit-for-Reinsurance Personal-Use Trust Fund, and US Surplus-Lines Personal-Use Trust Fund. Each such fund is predicated on the presence within self-regulators'-at-Lloyd's self-regulatory jurisdiction of the SYA participant *in quo*.

⁵⁴⁰ When his personal-use funds at Lloyd's are exhausted, the fact is irrelevant to the actual payment of the claim. There is no mechanism at Lloyd's to inform the assured-at-Lloyd's of any such event, or of the back-office steps taken to remedy it. Elaborate back-office systems have evolved at Lloyd's to ensure that the assured-at-Lloyd's valid claim is paid regardless, without him ever becoming aware of any difficulty.

detail of his own PTF. Policing relevant sufficiencies and enforcing relevant funding obligations are for relevant components of the Lloyd's enterprise, not for any assured-at-Lloyd's.

Lloyd's Act 1982, s.8(1) irrelevant to back-office liability

- 3.64** While Lloyd's Act 1982, s.8(1) does deal with the use to which a SYA participant's personal-use funds can properly be put, it does not address the completely separate issue of the SYA participant's or Member's⁵⁴¹ liability to contribute to relevant common-use claims payment securitisation funds — on which contributions the Lloyd's enterprise's solvency is principally founded. Self-regulators-at-Lloyd's set the level of a Member's or SYA participant's common-use fund contributions — which happen to be several — on a basis entirely opposed to s.8(1), viz., that a SYA participant's personal-use funds will be insufficient to meet his or another SYA participant's liability on any insurance contract made at Lloyd's. Such contributions and common-use funds have nothing to do with s.8(1). The Court of Appeal has held⁵⁴² that Lloyd's Act 1982, s.8(1)⁵⁴³ is separate from Members' Rulebook at Lloyd's obligation to make contributions to a centrally administered, common-use fund.⁵⁴⁴

bottom line

every SYA participant's general irrelevance

- 3.65** Recourse to an individual EquitasRe-reinsured SYA participant is feasible, if ever, only as a back-office matter by relevant members' and managing agencies or the Corporation.⁵⁴⁵ The current⁵⁴⁶ SYA participant is liable — quantitatively, relatively insignificantly in the case of a traditional-poly-slip — to the assured-at-Lloyd's under each of his insurance contracts. But he is never called upon to pay any money directly to any assured-at-Lloyd's for any purpose, and is rarely if ever the subject of a collection suit by an assured-at-Lloyd's. He merely funds (if he can) his PTF-premium, from which relevant trustees make relevant payments.⁵⁴⁷ The putative or actual assured-at-Lloyd's, similarly, never treats directly at any stage of any insurance transaction with any SYA participant but with the latter's managing agency.⁵⁴⁸ The reciprocal dynamics of why it is inappropriate and impractical to impose on any assured-at-Lloyd's, and for any assured-at-Lloyd's to attempt to discharge, the responsibility of collecting personally against any SYA participant include (for example):-

⁵⁴¹ Under the General Undertaking (natural Member) or MA 1 (corporate Member).

⁵⁴² See generally *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1401-3 (CA); *ibid.*, {1a} [1997] CLC 759, 781 (Colman J).

⁵⁴³ Lloyd's Act 1982, s.8(1):-

An underwriting member shall be a party to a contract of insurance underwritten at Lloyd's only if it is underwritten with several liability, each underwriting member for his own part and not one for another, and if the liability of each underwriting member is accepted solely for his own account.

And see *Rozanes v Bowen* (1928) 32 Lloyd's List Law Reports 98, 101 (Scrutton LJ.); *Tyser v The Shipowners Syndicate* [1896] 1 Q.B. 135.

⁵⁴⁴ *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402 (CA; italics added):-

It is important ... to recognise the distinction between the underwriting transactions concluded with policy holders by Lloyd's names as insurers or reinsurers, and the contracts and other arrangements that they make which are ancillary to that business. It is the former to which s.8(1) of the 1982 Act applies Section 8(1) is directed solely to the writing of *insurance* business at Lloyd's, not to contracts which the names may conclude thereafter which are ancillary to such business.

Cf. the confusing and inaccurate obfuscation at *Napier and Ettrick v R. F. Kershaw Ltd.* [1999] 1 WLR 756, 760 (Lord Steyn: "Each Name is only liable for his share of the risk but not for the share of any other Name: see section 8(1) of the Lloyd's Act 1982"). Lloyd's Act 1982, s.8(1) avers sole trading, not sharing. The Court of Appeal in *Leighs* {1a & 1b} does not appear to have correctly analysed the nature of each Member's Central Fund contribution, which is several. Instead, the court appears to have distinguished between several SYA-level liabilities and other Member-level liabilities the several nature of which the court did not inquire into.

⁵⁴⁵ See the footnote immediately above.

⁵⁴⁶ *Viz.*, the *originalis* or the most recent conventionally inward-RTCing SYA participant, whichever is the more recent: see p.207 *et seq.*

⁵⁴⁷ The PTF is discussed at *Astor's Law of Lloyd's*, 2nd Ed.

⁵⁴⁸ See generally for example Lloyd's Act 1982, s.8(2); Byelaw 8 of 1988, etc.

(1) generally: in relation to each defaulting SYA participant's invariably inconsequential unsecured⁵⁴⁹ debt (assuming, which is not the case, systems enabling the relevant managing agency to identify the particular default, and processes enabling rapid quantification of his particular participation) — ordinarily at Lloyd's, enforcement of a coverage judgment or award against any SYA participant is always dealt with by the latter's managing agency. In relation to an EquitasRe-reinsured SYA participant who is a RRC 1 Accepting Name, that proxy mechanism is not available because relevant RRC 1 releases⁵⁵⁰ — each assured-at-Lloyd's would have to be formally notified by self-regulators-at-Lloyd's of (among numerous other matters) the former's name, address, relevant assets, and relevant personal-use-fund insufficiency;⁵⁵¹ the assured-at-Lloyd's would have to identify, evaluate, pursue and enforce (and attempt to recover costs) against the SYA participant directly (or through his personal representative⁵⁵²), in each appropriate forum and jurisdiction under relevant governing law; in default, recourse issues would still arise and he would have to access as best he could relevant common-use funds; and in default of common-use funds, he would have to request (assuming, which has never been the case, an appropriate procedure) the Council to exercise its allegedly pure discretion to deploy the Central Fund to remedy the default. In the case of an insurance policy evidencing subscription by numerous diverse poly-stamps, this could involve dozens if not hundreds of separate coverage and or collection disputes, in some of which the defendant might wish to join his allegedly miscreant managing agency. Nothing of the kind is believed ever to have occurred at Lloyd's either ordinarily or extraordinarily, either in a mere collection or in any substantive coverage dispute;

(2) regulatorily and logistically: there is no mechanism at Lloyd's to disclose such matters to any assured-at-Lloyd's or any Lloyd's broker, or even (traditionally) to disclose to a prospective assured-at-Lloyd's the name, personal or financial circumstances or captive assets of each or any prospective subscriber or inward-RTCing SYA participant. There appears to be no mechanism at Lloyd's, and there is no requirement, for any Lloyd's broker, members' or managing agency to inform any assured-at-Lloyd's at any time of a relevant SYA participant's identity. Blue Books are not generally available; US coverage litigation appears sometimes to be characterised by the Lloyd's enterprise's profound unwillingness to divulge stamp composition. Lloyd's Act 1871 foresaw the practical difficulties;⁵⁵³

(3) commercially: it is not commercially feasible for the assured-at-Lloyd's to have any knowledge of the assured's-at-Lloyd's personal-use funds, to police them or to realise them, however exhausted they may be or extensive his defaults in replenishing them. An assured-at-Lloyd's contracts in the peculiar regulatory context of the Lloyd's enterprise — and thus for payment including from inward-RTCing SYA participants and the “chain of security” — not just for the accessible assets of the particular SYA participants with whom he has direct express contractual relations (who may be long dead and untraceable);

⁵⁴⁹ No SYA participant provides any security direct to any assured-at-Lloyd's.

⁵⁵⁰ See principally p.169.

⁵⁵¹ The assured-at-Lloyd's is not informed about cash calls, FAL drawdowns, injections of fresh money, FAL insufficiencies, deployment of the Central Fund as personal-use float, Corporation suits against the SYA participant for Central Fund reimbursement, etc. Such matters are irrelevant to claims payment securitisation at Lloyd's.

⁵⁵² Per Lloyd's Act 1982, s.9, Membership ceases automatically on bankruptcy. It is presumably outside the contemplation of the assured-at-Lloyd's, the Lloyd's enterprise, self-regulators-at-Lloyd's and external insurance regulators that in that circumstance the Lloyd's enterprise is extricated and he must recourse directly to the trustee in bankruptcy.

⁵⁵³ Lloyd's Act 1871, recital [9]: “And whereas, by reason of the mode in which the business of insurance has always been carried on by members of the Society, the names of those who underwrite a particular policy cannot, when a considerable time has elapsed, be traced with certainty, if at all”.

(4) accounting: SYA participants are not even dealt with discretely in the back office. Not even set-off,⁵⁵⁴ or management of PTFs-premium, is conducted at the level of individual SYA participant;

(5) financially: assuming accurate quantification in the first place, pursuit of each individual SYA participant would be limited to his insurance contractual liability, which would invariably, traditionally,⁵⁵⁵ be trivial,⁵⁵⁶ especially because there is no mechanism at Lloyd's to aggregate one Member's or even one SYA participant's liability to a particular assured-at-Lloyd's — or even the liability of all particular relevant EquitasRe-reinsured SYA participants in relation to all the valid claims of any one particular EquitasRe-assured-at-Lloyd's;

(6) procedurally: such a collection suit would give rise to various procedural issues. The SYA-level passivity rule and the ordinary and necessary conduct of insurance business at Lloyd's and by Equitas Re ensures that he is at all material times wholly unaware of the insurance contracts he has sold, how they are progressing, whether or not they have been discharged, any coverage or other disputes arising in relation to them, their terms including the nature and extent of his liability, how much they are likely to cost, and when they have been paid or otherwise discharged. The notion, apparently embraced by the Chancery Division⁵⁵⁷ in relation to executors of deceased EquitasRe-reinsured SYA participants, that the EquitasRe-reinsured SYA participant or his executor or even Equitas Re is capable of ascertaining or (assuming, incorrectly, any relevant obligation to do so) making any provision for his liability under any insurance contract to which he has been made a party — or that any party will ever ordinarily inform him of any such matter, or that any such matter is capable of ever becoming relevant to him or anyone else — is based on comprehensive ignorance of the course of insurance business at Lloyd's and the course of run-off agency at Equitas Re. It is not irrelevant to add that many EquitasRe-reinsured SYA participants were financially eviscerated in R&R and have no material assets;

(7) substantively: if compelled to participate personally in collection litigation, presumably the SYA participant defendant would wish to introduce substantive issues, other relevant parties, or procedural matters such as set-off;⁵⁵⁸

(8) logically: it cannot be that the only effect of a SYA participant defaulting on an insurance liability is to put the assured-at-Lloyd's to the trouble of proving in the defaulter's insolvency (and to put other SYA participants in jeopardy of regulatory sanction in relation only to future insurance transactions).

⁵⁵⁴ See p.75.

⁵⁵⁵ The financial dynamics would be different in the case of a spoastic SYA participant on a mono-slip, but that is not the case with EquitasRe-reinsured liabilities.

⁵⁵⁶ Cf. liability on back-office contracts such as the General Undertaking (as a Member, to the Corporation) and SUA 1 / SCA 1 (as a SYA participant, to his managing agency). Not insignificant sums may be involved in such collection litigation: see for example *Price and Price v Lloyd's* [2000] Lloyd's Rep IR 453 (Colman J); *Lloyd's v Leighs* {1a} [1997] CLC 759 (Colman J); *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398 (CA); *Lloyd's v Estate of McMurray* 274 F.3d 1133 (7th Cir. 2001); *Lloyd's v Ashenden* 233 F.3d 473 (7th Cir. 2000); *Lloyd's v Grace*, No. 604065/98, *slip op.* (N.Y. Sup. Ct. Nov. 12, 1999); *Richards v Lloyd's*, 135 F.3d 1289 (9th Cir. *en banc* 1998); *Haynsworth v Lloyd's*, 121 F.3d 956 (5th Cir. 1997); *Allen v Lloyd's*, 94 F.3d 923 (4th Cir. 1996); *Bonny v Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Roby v Lloyd's*, 996 F.2d 1353 (2d Cir. 1993); *Riley v Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992). Relevant common-use funds, especially the Central Fund as a personal-use-fund float, shield the assured-at-Lloyd's from such matters however old the insurance contract and however many times the liability has been conventionally inward-RTCed.

⁵⁵⁷ See the multiple errors at Chancery Division, Practice Statement — Estates of Deceased Lloyd's Names, May 25, 2001 ("3. The procedure applies to cases where the only, or only substantial, reason for delaying distribution of the estate is the possibility of personal liability to Lloyd's creditors ...").

⁵⁵⁸ See p.75.

the EquitasRe-reinsured SYA participant: self-regulators'-at-Lloyd's representations and indications

3.66 Self-regulators-at-Lloyd's appear to have indicated or implied that it may be appropriate for an EquitasRe-assured-at-Lloyd's to collect against an EquitasRe-reinsured SYA participant — for example, “absolute finality cannot be achieved for all Names”,⁵⁵⁹ “finality”,⁵⁶⁰ “a form of final reckoning”,⁵⁶¹ “such a final reckoning as described below and referred to as ‘finality’”,⁵⁶² “It is not within the power of Lloyd's to grant Names an absolute release from their liabilities to policyholders”,⁵⁶³ “the policyholder could pursue the relevant Names directly”,⁵⁶⁴ “[I]n the event Equitas is ultimately unable to satisfy all claims, such claims shall continue to be enforceable against the underwriting members who subscribed the original Old Years policies issued to American Policyholders ...”,⁵⁶⁵ “This would increase the prospect of underlying policy-holders enforcing their claims directly against Names”,⁵⁶⁶ etc.⁵⁶⁷ To the extent that such representations

559 *SOD*, p.116. Query what “absolute” adds to “finality”.

560 *SOD*, the then Chairman of Lloyd's July 30, 1996 cover letter, unnumbered first page; *ibid.*, the then Corporation's CEO's July 30, 1996 cover letter, pp. vi, vii.

561 *SOD*, p.111.

562 *SOD*, p.111.

563 *SOD*, p.7.

564 *SOD*, p.132.

565 Apparently in a May 25, 1995 stipulation agreement between the Corporation and NYID.

566 *SOD*, p.144:-

If Equitas determines that it has insufficient assets and becomes unable to meet the 1992 and prior liabilities in full as they fall due, it may decide to implement a proportionate cover plan under the provisions set out in the Reinsurance Contract. In this regard, the following points should be noted: [1] Residual liability: as Names retain the ultimate liability to policyholders, they would therefore remain liable for the proportion of a claim not met by Equitas, if Equitas were to invoke proportionate cover. [2] Insolvency procedures: if Equitas ... determines that it has insufficient assets, Equitas is not obliged to implement a proportionate cover plan and alternatively could choose to pursue a standard insolvency procedure. Standard insolvency procedures would be likely to result in a lengthy moratorium on the payment of claims. This would increase the prospect of underlying policy-holders enforcing their claims directly against Names.

(1) “Names retain the ultimate liability to policyholders”; (2) “they would therefore remain liable”: a *non sequitur* to the preceding proposition; (3) “This would increase the prospect of underlying policy-holders enforcing their claims directly against Names”: this is wholly unfounded.

567 See for example *SOD*, p.7:-

The combination of the Settlement Offer and the Equitas RITC will provide Names with “finality”: that is, a final reckoning of their liabilities in respect of 1992 and prior business. It is not within the power of Lloyds to grant Names an absolute release from their liabilities to policyholders.

And see *ibid.*, p.112:-

It is not within the power of Lloyd's to grant Names an absolute release from their liabilities to policyholders. Despite the reserve strengthening agreed with the DTI and the board of Equitas, these will still be a residual risk for Names of failure by Equitas to pay in full liabilities in respect of 1992 and prior business.

And see *ibid.*, p.144:-

[I]f Equitas ... determines that it has insufficient assets, Equitas is not obliged to implement a proportionate cover plan and alternatively could choose to pursue a standard insolvency procedure. Standard insolvency procedures would be likely to result in a lengthy moratorium on the payment of claims. This would increase the prospect of underlying policy-holders enforcing their claims directly against Names.

And see the highly misleading *ibid.*, p.137-138:-

[P]olicyholder claims do not cease or disappear if the original members have died or become bankrupt. Their estates remain liable and are entitled to the benefit of the indemnity from the members on the succeeding syndicate pursuant to the [138] RITC. The obligations under RITC contracts, in their customary form, are not dependent on the original insurers' ability to pay; in addition, policyholders in the United States would probably be able to bring their claims directly against current members on the syndicates which have provided indemnity cover through the RITC. Claims on a similar basis may be asserted in other jurisdictions[.]

And see *ibid.*, App. 5, §1.7 (p.2): in a proportionate cover plan: “Equitas will ... pay a proportion ... of each claim in respect of the 1992 and prior business. Since Names retain the ultimate liability for these claims, policyholders will be entitled to pursue Names for the balance of any claim”. See similarly *ibid.*, App. 5, §1.17 (p.4): “It is intended that once the Equitas premium has been paid there will be no further liability on Names to fund Equitas Reinsurance under the Reinsurance Contract, although Names will remain liable under the underlying policies of insurance and may be exposed to liability to policyholders in the event of an insolvency of Equitas or the implementation of a proportionate cover plan”). See similarly *ibid.*, p.144: “[A]s Names retain the ultimate liability to policyholders, they would therefore remain liable for the proportion of a claim not met by Equitas, if Equitas were to invoke proportionate cover”; *SOD*, p.99. And see *ibid.*, p.112, “Consequences of Cessation of Membership and Residual Risk for Names in the Event of Failure of Equitas”:-

are directed at any EquitasRe-assured-at-Lloyd's — singularly, corresponding representations to the class of EquitasRe-assured-at-Lloyd's appear to be extremely rare — they are problematic, for reasons discussed below.

the EquitasRe-reinsured SYA participant's particular irrelevance

3.67 The EquitasRe-reinsured SYA participant appears to be particularly irrelevant as a recourse source because (for example):-

(1) he is not required to maintain any fixed address,⁵⁶⁸ or to maintain any assets⁵⁶⁹ in any form in any jurisdiction;

It is not within the power of Lloyd's to grant Names an absolute release from the liabilities to policyholders. Despite the reserve strengthening agreed with the DTI and the board of Equitas, there will still be a residual risk for Names of failure by Equitas to pay in full liabilities in respect of 1992 and prior business. The introduction of the proportionate cover plan in the Reinsurance Contract may, in practice, help to mitigate this risk. This procedure has been introduced at the request of the DTI to protect policyholders. After a period during which the proportionate cover plan is being implemented, it would enable Equitas to continue paying a proportion of policyholder claims if it were ever confronted with a shortfall of assets and would enable Equitas to avoid the cessation of claim payment which would otherwise follow if Equitas were forced into insolvency. This procedure will also benefit Names, in that they would avoid the obligation of having to pay the full amount of their liabilities if Equitas were forced to cease paying claims.

To the extent that the last quoted sentence purports to indicate an entitlement of the Lloyd's enterprise to renege on "chain of security" claims payment securitisation it is, of course, wholly groundless.

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The former Member must notify Equitas Re's company secretary (on behalf of the Secretary of State) of any change of address within one month of that change or (when so requested by the Secretary of State and in the form and within the time specified by him) confirm what his address is, and the address for service of that notice is 33 St. Mary Axe, London EC3A 8LL until former Members are notified otherwise in writing by the Secretary of State: Notice to Designated Former Members of Lloyd's of London, [February] 1997 made under Insurance Companies Act 1982, s.44(1) and 45(1). This enables Equitas Re, as the Secretary of State's agent, to keep an up-to-date register of addresses of R&R-discharged former Members: January 27, 1997 explanatory letter from the DTI's Insurance Directorate, Members were notified of the requirement in *SOD: ibid.*, p.114 ("Under the arrangements proposed by the DTI, Equitas will maintain a register of correspondence addresses for ceased Names. Further details are given in a letter to the Chief Executive Officer of Lloyd's from the DTI set out in Appendix 4. By ticking the box in section 2 of the form of acceptance, a Name will be appointing Lloyd's as his attorney, as set out in the Settlement Agreement to execute documents on his behalf and take any other actions on his behalf to give effect to this regime, including making an application on his behalf to the Secretary of State for Trade and Industry for any appropriate modifications to the DTI's regulatory requirements"). The obligation does not apply to: (1) personal representatives of deceased EquitasRe-reinsured SYA participants: Lloyd's Statement of [Equitas Re] Reinsurance, December 27, 1997, cover letter, p.2 ("A Personal Representative of a deceased Name is not required by the regulatory authorities to provide Equitas with an up-to-date contact address, but should nevertheless do so to help communications concerning the deceased Name's Estate, including any information about return premium"); (2) executors: April 10, 1997 letter from DTI's Insurance Directorate's Stephen Walton to personal representatives of deceased Members ("You may be aware that the Department has introduced arrangements to regulate members of Lloyd's who leave the Society after reinsuring their underwriting liabilities with Equitas. In essence former members of Lloyd's are relieved of specified requirements in Part II of the insurance Companies Act 1982 (as amended by the Insurance (Lloyd's) Regulations 1996) but are required to notify Equitas of their new address if they move and may also be required to confirm their address from time to time. The Department does not consider it appropriate to apply those arrangements in relation to personal representatives of deceased former members of Lloyd's. You should, however, be aware that our decision in no way affects the outstanding contractual liabilities of deceased former members resulting from their underwriting during their membership of Lloyd's"); (3) trustees in bankruptcy of EquitasRe-reinsured former Members: April 10, 1997 letter from DTI's Insurance Directorate's Stephen Walton to trustees in bankruptcy of former members of Lloyd's ("You may be aware that the Department has introduced arrangements to regulate members of Lloyd's who leave the Society after reinsuring their underwriting liabilities with Equitas. In essence former members of Lloyd's are relieved of specified requirements in Part II of the insurance Companies Act 1982 (as amended by the Insurance (Lloyd's) Regulations 1996) but are required to notify Equitas of their new address if they move and may also be required to confirm their address from time to time. The Department does not consider it appropriate to apply those arrangements in relation to trustees in bankruptcy of former members of Lloyd's"); (4) IVA nominees of EquitasRe-reinsured former Members (April 10, 1997 letter from DTI's Insurance Directorate's Stephen Walton to nominees of former members of Lloyd's subject to IVAs ("You may be aware that the Department has introduced arrangements to regulate members of Lloyd's who leave the Society after reinsuring their underwriting liabilities with Equitas. In essence former members of Lloyd's are relieved of specified requirements in Part II of the insurance Companies Act 1982 (as amended by the Insurance (Lloyd's) Regulations 1996) but are required to notify Equitas of their new address if they move and may also be required to confirm their address from time to time. The Department does not consider it appropriate to apply those arrangements in relation to nominees of former members of Lloyd's who have entered into Individual Voluntary Arrangements in accordance with sections 252-263 of the Insolvency Act 1986"). And see *S&M*, §42 (p.15). See for example *Hansard*, House of Lords, 23 June 1997, Column WA149: Lloyd's Former Members: Regulatory Requirements:-

Lord Desai asked Her Majesty's Government: What steps they intend to take to prevent the dissipation or distancing of the personal funds of former Lloyd's Names who ceased to be members of Lloyd's with the benefit of Equitas reinsurance and who are now subject to regulation by the DTI under Part II of the Insurance Companies Act 1982, and whether other than by maintaining a record of the addresses of such Names they will now ascertain the nature and value of such funds in order to underwrite the contractual liability of such Names towards their policyholders. Lord Simon of Highbury: Where former members of Lloyd's have reinsured their 1992 and prior liabilities with Equitas, any claims from policyholders will be met from the assets which have been transferred to Equitas for that purpose. Where such former members have additionally reinsured all their outstanding liabilities from subsequent years through Lloyd's, it will be for the appropriate ongoing members of Lloyd's to meet relevant claims. Only in the unexpected event of Equitas or, where applicable, Lloyd's, failing to pay such claims in full might there be a call on the personal funds of former Names. The exercise of the Secretary of State's powers under Part II of the Insurance Companies Act 1982 in relation to former members of Lloyd's must be seen in that context. For the time being, the Secretary of State will maintain a record of the addresses of such former members. However, for so long as the relevant reinsurance arrangements continue in force and the claims against policies underwritten by former members' are being paid in full, I do not consider it necessary for the protection of policyholders for the Secretary of State to impose any further regulatory requirements upon, or take any further action against, former members of the Society.

And see *SOD*, App. 4, July 26, 1996 letter to the Corporation's then CEO from the DTI's then Director, Insurance Directorate, that letter, first unnumbered page:-

Jonathan Evans MP, then Minister for Corporate Affairs, announced on 31 October 1995 that he had reviewed the way in which the Insurance Companies Act 1982 (the Act) should apply to Names who cease to be members of Lloyd's. He announced that former Names will, for the purposes of the Act, technically continue to carry on insurance business for so long as they are potentially liable to meet claims on policies written while they were active underwriting members of the Society, until all liabilities on those policies have been extinguished. This would remain the case even though these liabilities had been fully reinsured and claims on those policies were being handled by agents. In consequence, former Names' insurance business under the Act would fall to be regulated by the Secretary of State, in accordance with the provisions of Part II of the Act, to protect the interests of policyholders.

The text is highly infelicitous. For example: (1) "Names who cease to be members of Lloyd's": former Members who are EquitasRe-reinsured SYA participants are meant, not former Members who are conventionally RTCed SYA participants; (2) "policies written while they were active underwriting members of the Society" correctly implies that the inward-RTC that they sold counts as current liabilities, which it does — which sits illogically with *their* outward RTCed being similarly continuing to be liable, which under the DTI rules they are not; (3) "fully reinsured" is error for RTC; (4) "claims on those policies were being handled by agents": claims must be handled by managing agencies in any event: the point is irrelevant to external insurance regulation; (4) "In consequence" is misleading: continuing Insurance Companies Act 1982 supervision is not in consequence of anything said in the quote, all of which applies to conventional RTC; (5) "in accordance with the provisions of Part II of the Act" is misleading: underwriting Members are not external-insurance-regulated in accordance with Insurance Companies Act 1982, Part II but in accordance with the customised provisions at *ibid.*, ss.15(4) and 83-86; (6) "to protect the interests of policyholders" is misleading: protection cannot arise from personal-use funds in isolation of the Lloyd's enterprise's cash conveyor belt which seize and agglomerates them; nor does the DTI regime guarantee that any former Member who is an EquitasRe-reinsured SYA participant will have any funds, nor requires him to keep a minimum reserve of funds; nor implements any special procedure to monitor his solvency or insolvency. And the mere register of addresses in itself has no monetary value. And see *SOD*, App. 4, July 26, 1996 letter to the Corporation's then CEO from the DTI's then Director, Insurance Directorate:-

[T]he Secretary of State is satisfied that the interests of policyholders of Names who cease to be members of the Society with the benefit of Equitas and/or syndicate reinsurance to close will be suitably protected where: (i) the relevant authorisation conditions on Equitas have been lifted and the Equitas reinsurance has become effective; and (ii) Equitas and/or (in respect of a syndicate reinsurance to close) the relevant Lloyd's syndicates continue to pay claims in full without the performance of contracts of insurance reverting in whole or in part to resigned Names. The Secretary of State has, therefore, indicated that he would be prepared to make orders under section 68 of the [Insurance Companies Act 1982] which, for so long as it appears likely to him that policyholders will be so protected, would set limited regulatory requirements of an appropriate kind. It is accordingly proposed that the Secretary of State will, upon the application of Names who cease to be members of the Society, make an order within the terms of section 68, disapplying from them all of the provisions to which section 68 applies on the condition that they notify Equitas of any change of address and provide, when requested, confirmation of their current address. The Secretary of State would have the power to revoke the section 68 order, in particular, if Equitas and/or Lloyd's should cease to pay claims in full. ... [I]t is intended to introduce secondary legislation before the end of the year which would confirm the scope of the Act and orders under section 68 in relation to former Names.

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On statutory sanctions for insolvency generally, see for example Insolvency Act 1986, Part IX etc. No external insurance regulator appears to have made any assessment of any of the assets of any EquitasRe-reinsured SYA participant. some EquitasRe-reinsured SYA participants were financially eviscerated. A scheme was promoted after RRC 4, with the knowledge of self-regulators-at-Lloyd's and UK external insurance regulators for transfer of the EquitasRe-reinsured SYA participant's assets to a custodian. *Per* the broker's publicity brochure:-

Penates provides a means whereby immediately after the implementation of Equitas, assets of the Name can be transferred to an independent custodian under a formal agreement Under these arrangements, the transferred assets no longer form part of the Name's wealth. ... [W]e have received Counsel's Opinion ... that if Equitas were to fail and subject to the necessary requirements, the transferred assets should not be exposed to such failure. ... Penates has been developed in conjunction with a major firm of City solicitors, accountants and high street banks. Furthermore, the opinion of Queen's Counsel has been obtained. We are thus satisfied that Penates achieves its objectives.

A "Draft Agreement", "Commentary", "Tax Summary" and "Counsel's Opinion" could be obtained by paying a "deposit" of £250 plus VAT.

(2) pointless: the EquitasRe-reinsured SYA participant's insurance liability is already either expressly⁵⁷⁰ covered by common-use funds or comes within the category of liabilities which, there being no basis for having left the Lloyd's enterprise in the first place, it is sustainably arguable⁵⁷¹ should be paid by the Central Fund and or by the Corporation's personal assets. There should be no difficulty in principle while the Lloyd's enterprise continues to do business as usual, purports to be solvent, and furnish relevant common-use funds, *a fortiori* if the SYA participant has been released — as has each RRC 1⁵⁷² Accepting Name — from having to provide any relevant personal-use funds to the Lloyd's enterprise, and *a fortiori* given that the EquitasRe-reinsured SYA participant who has ceased to be a Member is not required to have any assets for any purpose;

(3) no back-office collection rights: every RRC 1 Accepting Name has been expressly released⁵⁷³ from having to make any contribution to any personal-use or common-use fund for any purpose, has been formally and permanently released from all back-office funding requirements, *viz.* to his relevant members' agency,⁵⁷⁴ and each of his relevant managing agencies,⁵⁷⁵ and by the Corporation.⁵⁷⁶ He is therefore safe from being pursued by the only people capable of agglomerating his relevant liabilities into an amount worth collecting⁵⁷⁷ (including as a proxy for any EquitasRe-assured-at-Lloyd's). And he has been formally and permanently released from all liability to provide more money to Equitas Re.⁵⁷⁸ If he is no longer a Member,⁵⁷⁹ he is, arguably, not even within self-regulators'-at-Lloyd's jurisdiction. And there is no other device to recover any money from any EquitasRe-reinsured SYA participant for the benefit of any EquitasRe-assured-at-Lloyd's;

(4) Equitas Policyholders Trustee has no right to collect from any EquitasRe-reinsured SYA participant on behalf of anyone. Its principal RRC 7 financial task is to marshall and distribute such relevant Equitas Re assets as happen to be available;

(5) statutory register: the commercial, financial or regulatory purpose of the register⁵⁸⁰ of EquitasRe-reinsured SYA participants' names and addresses appears to be based on the UK govern-

⁵⁷⁰ See Chapter 3, Sub-chapter 1.

⁵⁷¹ See Chapter 3, Sub-chapter 2.

⁵⁷² As at RRC 1, §5.1 (release by the RRC 1 Accepting Name's relevant members' agency), *ibid.* (release by each of his relevant managing agencies), or to make any relevant reimbursement to the Central Fund §§3.3-3.4 (release by the Corporation), and *ibid.*, §6.4 (release by Equitas Re).

⁵⁷³ See above footnote.

⁵⁷⁴ See RRC 1, §5.1.

⁵⁷⁵ See RRC 1, §5.1.

⁵⁷⁶ See RRC 1, §§3.3-3.4.

⁵⁷⁷ Self-regulators-at-Lloyd's could of course appoint a substitute run-off agency in place of Equitas Re, and then provide it with all the data necessary (assuming it can be discerned from Equitas Re's records: see the accounting problem raised by RRC 4, §15.3.

⁵⁷⁸ See p.169.

⁵⁷⁹ On termination of Membership en masse after RRC 4's execution, see for example *One Lime Street*, February 1997, p.4 ("Membership cessation process begins"). Notwithstanding the relevant conventional Rulebook at Lloyd's provision — *viz.*, Byelaw 17 of 1993, §40. See *SOD*, p.111:-

For the purposes of the Reconstruction and Renewal plan, the Council may exercise its power under paragraph 14(5) of the Reconstruction and Renewal Byelaw to shorten the period at the end of which the resigned or resigning member shall cease to be a member of the Society. It is currently intended that, subject to the conditions specified above having been satisfied, the majority of resigned or resigning members will be able to cease as members of the Society shortly after they have paid their finality bills and any remaining funds at Lloyd's of the Name will be released. It is intended that the process of cessation will start during October 1996. However, the Council also has the power, under paragraph 40(8) of the Membership Byelaw, to extend the effective date of resignation as it considers appropriate, and will do so if a Name's finality bill is still outstanding or if there are disciplinary reasons to do so. The timing of a resigned or resigning Name's cessation of membership will depend on when he ceased to underwrite and whether he has any open years not being reinsured into Equitas.

⁵⁸⁰ And see Equitas Holdings RA fye March 31, 2002, p.55 ("Notice to Reinsured Names");-

Reinsured Names should note that the Reinsurance and Run-Off Contract dated 3 September 1996 calls for Equitas to request confirmation of or notification of any amendment to Reinsured Names' addresses annually. A separate card seeking such in-

ment's⁵⁸¹ misconception of how recourse operates at Lloyd's, and in any event the sanctions for breach of the address requirement are inconsequential. "[T]he DTI has confirmed that policyholders' rights would be the first priority if the exercise of its powers were invoked"⁵⁸² appears to be unsustainable regulatorily. English courts have gone further, by permitting executors to distribute the estates of EquitasRe-reinsured SYA participants without retention.⁵⁸³

formation accompanies this report. Pursuant to Clause 22.2 of the Reinsurance and Run-Off Contract, Reinsured Names must provide Equitas Reinsurance Limited with such information within 21 business days of this request. Reinsured Names whose addresses change during the year are asked to report these changes promptly to the Company Secretary, Equitas Reinsurance Limited, 33 St Mary Axe, London EC3A 8LL, United Kingdom.

581 See for example Hansard, House of Lords, 23 June 1997 : Column WA149 ("Lloyd's Former Members: Regulatory Requirements"):-

Lord Desai asked Her Majesty's Government: What steps they intend to take to prevent the dissipation or distancing of the personal funds of former Lloyd's Names who ceased to be members of Lloyd's with the benefit of Equitas reinsurance and who are now subject to regulation by the DTI under Part II of the Insurance Companies Act 1982, and whether other than by maintaining a record of the addresses of such Names they will now ascertain the nature and value of such funds in order to underwrite the contractual liability of such Names towards their policyholders.

Lord Simon of Highbury: Where former members of Lloyd's have reinsured their 1992 and prior liabilities with Equitas, any claims from policyholders will be met from the assets which have been transferred to Equitas for that purpose. Where such former members have additionally reinsured all their outstanding liabilities from subsequent years through Lloyd's, it will be for the appropriate ongoing members of Lloyd's to meet relevant claims. Only in the unexpected event of Equitas or, where applicable, Lloyd's, failing to pay such claims in full might there be a call on the personal funds of former Names. The exercise of the Secretary of State's powers under Part II of the Insurance Companies Act 1982 in relation to former members of Lloyd's must be seen in that context. For the time being, the Secretary of State will maintain a record of the addresses of such former members. However, for so long as the relevant reinsurance arrangements continue in force and the claims against policies underwritten by former members' are being paid in full, I do not consider it necessary for the protection of policyholders for the Secretary of State to impose any further regulatory requirements upon, or take any further action against, former members of the Society.

582 SOD, p.113.

583 See *Re Yorke (decd.)*; *Stone v Chataway* [1997] 4 All ER 907; (now obsolete; see below) *Practice Statement*, December 21, 1997 [1988] 1 Lloyd's Rep. 223; *Practice Statement — Estates of Deceased Lloyd's Names*, May 25, 2001 [2001] 3 All ER 765 (Schedules omitted):-

1. This Practice Statement replaces the Practice Direction dated 21st November 1997. The references to that Practice Direction in RSC PD 85 and CPR rule 8.2A should therefore be taken as references to this Practice Statement and paragraphs 26.49-26.55 of, and Appendix 7 to, the Chancery Guide (September 2000) should now be read in light of this Practice Statement. 2. Personal representatives or trustees who wish to apply to the Court for permission to distribute the estate of a deceased Lloyd's Name following the decision of Lindsay J. in *Re Yorke* (deceased) [1997] 4 All E.R. 907 or to administer any will trusts arising in such an estate, may, until further notice and if appropriate in the particular estate, adopt the following procedure. 3. The procedure applies to cases where the only, or only substantial, reason for delaying distribution of the estate is the possibility of personal liability to Lloyd's creditors and: (a) all liabilities of the estate in respect of syndicates of which the Name was a member for the years of account 1992 and earlier (if any) have been reinsured (whether directly or indirectly) into the Equitas Group and (b) all liabilities of the estate in respect of syndicates of which the Name was a member for the years of account 1993 and later (if any): (i) arise in respect of syndicates which have closed by reinsurance in the usual way or (ii) are protected by the terms of an Estate Protection Plan issued by Centrewrite Limited or (iii) are protected by the terms of EXEAT insurance cover provided by Centrewrite Limited. 4. In these circumstances personal representatives (and, if applicable, trustees) may apply by a Part 8 Claim form (Form N208) headed *In the Matter of the Estate of [] deceased (a Lloyd's Estate)* and *In the Matter of the Practice Statement dated 2001 for permission to distribute the estate (and, if applicable, to administer the will trusts)* on the footing that no or no further provision need be made for Lloyd's creditors. Ordinarily, the claim form need not name any other party. It may be issued in this form without a separate application for permission under rule 8.2A. 5. The Claim Form should be supported by a witness statement or an affidavit substantially in the form set out in Schedule 1 to this Practice Statement adapted as necessary to the particular circumstances. (Adaptation will be necessary where, for example, the Claimants are trustees rather than personal representatives or where one Claimant makes the statement on behalf of the others and with their authority). The Claim Form should also be accompanied by a draft order substantially in the form set out in Schedule 2 to this Practice Statement. 6. If the amount of costs has been agreed with the residuary beneficiaries (or, if the costs are not to be taken from residue, with the beneficiaries affected) their signed consent to those costs should also be submitted. If the Claimants are inviting the Court to make a summary assessment they should submit a statement of costs in the form specified in the Costs Practice Direction. If in his discretion the Master (or outside London the District Judge) thinks fit, he will summarily assess the costs but with permission for the paying party to apply within 14 days of service of the order on him to vary or discharge the summary assessment. Subject to the foregoing, the order will provide for a detailed assessment unless subsequently agreed. 7. The application will be considered in the first instance by the Master (or outside London the District Judge) who, if satisfied that the order should be made, may make it without requiring the attendance of the Claimants and the Court will send it to them. If not so satisfied, the Master or District Judge may give directions for the further disposal of the application.

The Practice Statement strongly indicates that the Chancery Division does not understand the nature and dynamics of a SYA participant's liability.

Such matters do not bespeak meaningful financial recourse to the EquitasRe-reinsured SYA participant. As a practical matter, the LSO 2 sales⁵⁸⁴ concept of “finality” *simpliciter* (“Finality Amount”,⁵⁸⁵ “Additional Finality Amount”,⁵⁸⁶ “finality benefits”,⁵⁸⁷ “Finality Bill”,⁵⁸⁸ “Finality Payment Deadline”,⁵⁸⁹ “Finality Receipt”,⁵⁹⁰ “Finality Shortfall”,⁵⁹¹ and “Finality Statement”,⁵⁹² etc.), though self-regulators-at-Lloyd’s are equivocal,⁵⁹³ can be taken literally.

external regulation of liberated EquitasRe-reinsured SYA participants: Financial Services and Markets Act 2000, s.320-322

- 3.68 A set of FSA provisions — “intended to promote confidence in the market at Lloyd’s”⁵⁹⁴ — relates to SYA participants who ceased to be Members on or after December 24, 1996,⁵⁹⁵ principally those EquitasRe-reinsured SYA participants who decided not to remain at Lloyd’s after R&R. Financial Services and Markets Act 2000, ss.320-322 set out various provisions. Terminology is misleading to begin with: the sections are directed to the former Member purely as SYA participant (*viz.*, a provider of personal-use funds to meet his Lloyd’s Act 1982, s.8(1) liabilities), not as a Member (*viz.*, a contributor to common-use funds to meet his relevant General Undertaking liabilities). Various regulatory difficulties arise. For example:-

(1) ss.320 and 322 purport to be for the protection of assureds-at-Lloyd’s.⁵⁹⁶ This is wholly unsustainable. For example: (a) the EquitasRe-assured’s-at-Lloyd’s relevant interests appear to have been prejudiced by the New Central Fund’s purported prohibition on its use to pay any Eq-

584 The lack of closure being one reason for the failure of LSO 1 and partly explaining why self-regulators-at-Lloyd’s proclaimed in *SOD* that they had “done our best to make the settlement offer as attractive as possible”: *SOD*, July 30, 1996 cover letter from the then Chairman of Lloyd’s, first unnumbered page. Provisions in Byelaw 22 of 1995 did not envisage unconditional finality but finality only as between the EquitasRe-reinsured SYA participant and Equitas Re: see for example *ibid.*, §4(2) (*italics added*):-

A contract of reinsurance with Equitas to which this paragraph applies may include provision to the effect: ... (b) that, subject to the terms of any arrangements for structured or deferred payment and to any other exceptions which may be provided by the contract, payment of the premium and any other sums expressly provided by the contract shall constitute the only financial obligations of the relevant member or former member of the Society to *Equitas* and accordingly that the member or former member shall not be or become liable to make any further payment to *Equitas* in respect of the contract or the liabilities reinsured under the contract.

585 See the extensive definition of “Finality Amount”, and elucidation of the calculation “F = FB + (T + PSL + T4 + SC + I + P) - (L + A + LR + UPSL + HA + SN)” at *SOD*, App. 2 (“Terms and conditions of the settlement offer”), §I (“Terms and Conditions relating to Payment”); *SOD*, App. 2, p.9.

586 Offerees received a Finality Statement in July 1996 and another, final, Finality Statement in August 1996: *Manning v Lloyd’s* [1998] Lloyd’s Rep IR 186, 191 (Mance J). For judicial criticism of its relative lack of clarity, see for example *ibid.*, 190 (“[O]ne may have a degree of sympathy with the view that the Finality Statement is not as clearly set out as it could have been”); *SOD*, App. 2, p.9.

587 At for example *SOD*, App. 2, p.13.

588 At for example *SOD*, Ch. 5.

589 At for example *SOD*, App. 2, p.12.

590 At for example *SOD*, App. 2

591 At for example *SOD*, App. 2, p.12.

592 At for example *SOD*, App. 2, p.2.

593 See for example *Captives Guidance Notes 1999*, Section D, §15.2 (p.37; *italics added*): “By reinsuring all 1992 and prior years of account into Equitas (except life business), Lloyd’s syndicates *should* have no further exposure to liabilities for policies written in those years”.

594 FSA Lloyd’s Rulebook, §5.1.3. *Ibid.*:-

The rules and guidance in this chapter are intended to promote confidence in the market at Lloyd’s and to protect certain consumers of services provided by the Society in carrying on or in connection with or for the purposes of its regulated activities by: (1) protecting policyholders against the risk that former underwriting members may not be able to meet any liabilities to carry out contracts of insurance that they underwrote at Lloyd’s; and (2) enabling the FSA to impose requirements under section 320(3) of the Act (Former underwriting members) if it considers this appropriate to protect policyholders.

595 Financial Services and Markets Act 2000, s.324(1).

596 Financial Services and Markets Act 2000, s.320(3) (“... for the purpose of protecting policyholders against the risk that he may not be able to meet his liabilities”); *ibid.*, s.322(1) (“... for the purpose of protecting policyholders against the risk that those persons may not be able to meet their liabilities”).

uitasRe-reinsured liability without the consent of Members in Corporation general meeting;⁵⁹⁷ (b) imposing a s.320 requirement is incapable of protecting the assured-at-Lloyd's since the requiree's liability on any one insurance contract will always be financially insignificant. Only mass effects such as common-use funds are capable of protecting an assured-at-Lloyd's insured, in any one insurance transaction, by possibly scores or hundreds of individuals. The individual SYA participant has never vouchsafed to any assured-at-Lloyd's that any insurance liability will be paid, especially including the insignificant sums for which he is liable to any one particular assured-at-Lloyd's and especially given the absence of any mechanism or accounting process to agglomerate any one particular Member's insurance liabilities to any one particular assured-at-Lloyd's. Such assurances have necessarily been required of and been given by the Lloyd's enterprise. Protection for the assured-at-Lloyd's lies not in releasing the SYA participant from Membership without any requirement to maintain a fixed address or any assets in any form but, as has been the case at Lloyd's since at least 1927, in maintaining common-use funds at the Lloyd's enterprise and, most recently, in external insurance regulation expressly stipulating for the Corporation to use its personal assets for that purpose;

(2) *ibid.*, s.320(1) — “A former underwriting member may carry out each contract of insurance that he has underwritten at Lloyd's whether or not he is an authorised person.” — appears to be based on comprehensive misunderstanding of how conventional RTC works. The conventionally outward-RTCED SYA participant never performs, is never asked to perform, is in a position to perform, and is positively placed in a position by self-regulators-at-Lloyd's where he is unable to perform, any outward-RTCED insurance contract. The Lloyd's enterprise, including conventional RTC, could not and does not function in any other way;

(3) *ibid.*, s.320(3) — “The Authority may impose on a former underwriting member such requirements as appear to it to be appropriate for the purpose of protecting policyholders against the risk that he may not be able to meet his liabilities.” — appears to be based on various logical, regulatory, financial, commercial and procedural misconceptions. For example: (a) the regulator has no procedure or mechanism in place to ascertain at any time the extent of his liability under any particular insurance contract in the first place — there are millions of such contracts; (b) the regulator has no procedure or mechanism in place to ascertain whether he has any assets or not in the first place; (c) the amount of his liability under a particular insurance contract will always be insignificant and thus incapable of giving rise to any meaningful protection issues in the first place; (d) because of common-use funds at the Lloyd's enterprise, the state of his assets is wholly irrelevant in the first place. Nor, presumably, would external insurance regulators contemplate replacing to any extent any stipulation for common-use funds with former Members' assets, which because of Lloyd's Act 1982, s.8(1) could be used only as personal-use funds in the first place; (e) many if not most EquitasRe-reinsured former Members, if ever called upon to provide any personal-use funds, can be expected to divest themselves of their visible assets; (f) query the procedure in relation to the distributed estates of deceased former Members; (g) presumably not every individual SYA participant former Member will be rounded up and required to provide personal-use funds in relation to his Lloyd's Act 1982, s.8(1) liabilities, leaving a shortfall to be met in any event by common-use funds, which is what already happens. In any event the subsection's premise (“his liabilities”) is flawed. First, it has never been the front-office case at Lloyd's that any SYA participant is solely liable for his own insurance liabilities: hence common-use funds. Secondly, conventional RTC extricates him from his outward-RTCED liabilities, while EquitasRe-RTC merely retains the liabilities within the Lloyd's enterprise;

(4) the apparently otiose *ibid.*, s.322(1) — “The Authority may make rules imposing such requirements on persons to whom the rules apply as appear to it to be appropriate for protecting

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See p.131.

policyholders against the risk that those persons may not be able to meet their liabilities.” — appears to be similarly objectionable.

The Corporation is required⁵⁹⁸ to draw the three sections to the attention of any person who ceases to be a Member on or after their commencement date: no later than December 1, 2001.⁵⁹⁹ The Corporation is required to require any natural person who ceases to be a Member on or after commencement date: no later than December 1, 2001 to make arrangements to notify the Corporation of his death;⁶⁰⁰ and notify it of any change in his address within one month of the change during his lifetime.⁶⁰¹ The Corporation must keep records of such notification and give FSA access to them on the latter’s request.⁶⁰² There is no meaningful redress for contravention of the rules, either in available resources to pay claims or in damages for bad regulation.⁶⁰³

OTHER RECOURSE

the Lloyd’s broker

- 3.69** The EquitasRe-assured-at-Lloyd’s will presumably look to his Lloyd’s broker (especially to the extent that such matters are not within the expertise of the claimant’s own lawyer) to particularly give strategic and tactical advice on the collection process, including what steps should and should not be taken in order to recourse to relevant funds. The full extent of the Lloyd’s broker’s liability for EquitasRe-reinsured liabilities has not yet been judicially considered. The Lloyd’s broker appears to have the usual duty to ensure that the EquitasRe-assured-at-Lloyd’s diligently, properly, timeously and effectively pursues every relevant common-use claims payment securitisation fund available at Lloyd’s so as to recover 100% of his valid claim. There is no legal basis for permitting the Lloyd’s broker a lesser standard of claims broking professionalism at Equitas Re than at Lloyd’s. The Lloyd’s broker may be personally liable to its client EquitasRe-assured-at-Lloyd’s for the difference between the amount recovered from Equitas Re and 100% of the claim; the EquitasRe-assured-at-Lloyd’s will presumably wish to conduct itself so as to preserve its relevant rights and remedies accordingly. In relation to a broker’s actionable failure to put itself in a position where it is able to properly fully and completely collect a claim, it appears conceptually irrelevant that the proximate cause is, on the one hand, its failure to keep documents or otherwise conduct itself with due competence⁶⁰⁴ or, on the other, its failure to act — or advise⁶⁰⁵

⁵⁹⁸ FSA Lloyd’s Rulebook, §5.2.1.

⁵⁹⁹ Notwithstanding Financial Services and Markets Act 2000, s.324(1), which applies ss.320-322 to a person who ceases to be a Member on or after December 24, 1996.

⁶⁰⁰ FSA Lloyd’s Rulebook, §5.2.2(2).

⁶⁰¹ FSA Lloyd’s Rulebook, §5.2.2(1).

⁶⁰² FSA Lloyd’s Rulebook, §5.2.3.

⁶⁰³ FSA Lloyd’s Rulebook, §5.1.2:-

A contravention of the rules in this chapter does not give rise to a right of action by a private person under section 150 of the Act (Actions for damages) and each of those rules is specified under section 150(2) of the Act as a provision giving rise to no such right of action.

⁶⁰⁴ *Aneco Reinsurance Underwriting Ltd. v Johnson & Higgins Ltd.* [2002] 1 Lloyd’s Rep. 157 (HL); *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 475, 477 (Clarke J). And see the broker action referred to at *New Cap Reinsurance Corporation Ltd. v HIH Casualty & General Insurance Ltd.* (CA, February 20, 2002; unreported), §14 (Jonathan Parker LJ). For the obverse situation, viz., SYA participants suing brokers for bringing them assureds’-at-Lloyd’s undesirable business, see for example *Aldrich v Marsh & McLennan Cos.* (NY Sup., New York Cty., May 22, 2001).

⁶⁰⁵ It is believed to be unheard of for any Lloyd’s broker, notwithstanding its advocacy at the sales stage of insurance from “Lloyd’s” for “its” superior securitisation — and which presumably implicitly represents that it knows how to broke claims at both Lloyd’s and Equitas Re — to routinely: (1) inform any assured-at-Lloyd’s that every insurance liability at Lloyd’s is payable 100% at Lloyd’s; (2) advise the assured-at-Lloyd’s on the securitisation available to him at Lloyd’s, especially the detailed operation of relevant particular common-use funds; (3) broke any part of an EquitasRe-assured’s-at-Lloyd’s claim at Lloyd’s instead of or as well as at Equitas Re, including for any difference between 100% of a claim and the amount Equitas Re may offer.

the uninformed EquitasRe-assured-at-Lloyd's client to act — in accordance with recourse fund governing instruments, the provisions of which (presumably necessarily well within the Lloyd's broker's specialist knowledge) presumably form part of the elementary financial and regulatory context in which the Lloyd's broker seeks to persuade its client to buy insurance specifically at Lloyd's. Channelling the client's valid claim exclusively to Equitas Re and condoling in his predicament of whether to settle with Equitas Re for materially less than 100% do not properly discharge the Lloyd's broker's claims broking duties. Lloyd's brokers are anecdotally said to be under the clear impression that "Lloyd's" is the "ultimate guarantor" of every EquitasRe-reinsured liability.

external compensation funds

- 3.70** The FSA Compensation Scheme fund⁶⁰⁶ (funded by insurance industry levies to which neither SYA participants⁶⁰⁷ nor Equitas Re⁶⁰⁸ or Equitas Ltd. contribute) is (like its predecessor, the Policyholders Protection Scheme⁶⁰⁹) not⁶¹⁰ available to any EquitasRe-assured-at-Lloyd's in relation to his insurance contract with any EquitasRe-reinsured SYA participant. On the other hand, the fund may be in principle available to any EquitasRe-reinsured SYA participant (via whom Equitas Policyholders Trustee might perhaps have been able to claim on behalf of EquitasRe-

⁶⁰⁶ On the scheme generally see Financial Services and Markets Act 2000, Part XV and regulations made thereunder; FSA Compensation Scheme Rulebook. Historically, see for example CP 16, §141-147; CP 48, §7.8 "Section 3.8 [of the then proposed FSA Lloyd's Rulebook] covers the provision of information to the FSA on the Central Fund. This will help the FSA monitor Lloyd's common security in the light of the decision not to give Lloyd's policyholders access to the new compensation scheme." On the fund's aspirations, see FSA Compensation Scheme Rulebook:-

1.1.9 This sourcebook is one of the means by which the FSA will meet its regulatory objectives of securing the appropriate degree of protection for consumers and maintaining confidence in the financial system. 1.1.10 By setting up the FSCS and making rules that allow the FSCS to provide compensation at a level appropriate for the protection of retail consumers and small businesses, the FSA enables consumers to participate in the financial markets with the confidence that they will be protected, at least in part, should the relevant person with whom they are dealing be unable to satisfy claims against it.

⁶⁰⁷ SYA participants are exempt *per* FSA Compensation Scheme Rulebook, §13.3.1: "A participant firm which does not conduct business that could give rise to a protected claim by an eligible claimant and has no reasonable likelihood of doing so is exempt from a specific costs levy, or a compensation costs levy, or both, provided that it notifies the FSCS of this fact and the notice remains current."

⁶⁰⁸ Equitas Re and Equitas Ltd. are exempt *per* FSA Compensation Scheme Rulebook, §13.3.1: "A participant firm which does not conduct business that could give rise to a protected claim by an eligible claimant and has no reasonable likelihood of doing so is exempt from a specific costs levy, or a compensation costs levy, or both, provided that it notifies the FSCS of this fact and the notice remains current." The FSA considers the RRC 4, §3 and the RRC 5, §2 products to be reinsurance, to which extent a "protected claim" cannot arise: FSA Compensation Scheme Rulebook, §5.4.5(1) read with §5.4.5(2) and FSA Glossary definition of "relevant general insurance contract", *viz.*, "any general insurance contract other than: (a) a reinsurance contract".

⁶⁰⁹ See Policyholders Protection Act 1975, s.3(2)(a) as substituted by Policyholders Protection Act 1997, s.1(1) read with Insurance Companies Act 1982, s.2(2)(a). Policyholders Protection Act 1975 was repealed by Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (SI 2001/3649). The Policyholders Protection Board was disbanded by Financial Services and Markets Act 2000, s.416(3)(b). Apparently the UK Government believed that a not-discretionary compensation fund existed at Lloyd's: See for example *Hansard*, House of Lords, Cols. 312-313, February 12, 1997, Policyholders Protection Bill, 2nd reading: Viscount Chelmsford:-

The Bill makes a number of amendments to the Policy Holders Protection Act 1975. That Act provides a system of compensation to certain policyholders of failed insurance companies. Before providing your Lordships with details of the proposed amendments, I should explain how the compensation scheme works. The scheme is administered by the Policyholders Protection Board. If an insurance company fails and goes into liquidation, the board is required to compensate policyholders who are holders of "United Kingdom policies" as defined in the Policy Holders Protection Act. In relation to general business policies the protection is 100 per cent. in the case of compulsory insurance requirements, such as third party motor cover. Other claims are protected to the extent of 90 per cent. provided the policyholder is a private individual, including private individuals as members of partnerships. In relation to long term business the board is required to try to secure continuity of cover so that 90 per cent. of the future benefit of the policy is protected. If this proves impossible, the board is required to pay a sum equal to 90 per cent. of the value of the policy in the liquidation. I should add that marine, aviation and transport insurance and reinsurance business is not covered by the Act. Nor is Lloyd's of London, which has its own compensation scheme.

⁶¹⁰ The SYA participant is not a FSA Compensation Scheme Rulebook, §6.2.1 "relevant person": *ibid.*, §6.2.1(1) ("participant firm") read with FSA Glossary, definition of "participant firm", §(d) ("a member, in respect of effecting or carrying out Lloyd's policies") (and if the EquitasRe-assured's-at-Lloyd's contract with the EquitasRe-reinsured SYA participant is reinsurance, a "protected claim" does not arise in any event: FSA Compensation Scheme Rulebook, §5.4.5(1) read with §5.4.5(2) and FSA Glossary definition of "relevant general insurance contract", *viz.*, "any general insurance contract other than: (a) a reinsurance contract").

assureds-at-Lloyd's) — because to the extent that the pre-conditions⁶¹¹ are met — but not⁶¹² if the RRC 4, §3 product is reinsurance. There may be consumer protection schemes available at US state level.

malpractice suit against lawyer

- 3.71** Most US federal and state reported cases on the Equitas and Lloyd's enterprises demonstrate or suggest material fundamental misunderstanding of the ordinary course of business at Lloyd's. It is an extremely bold lawyer who ventures to practise in this field without mastering it. Erroneous "law of the case" will presumably not protect the responsible lawyer from a malpractice suit by an EquitasRe-assured-at-Lloyd's deprived of recourse by his own lawyer's ignorance.

⁶¹¹ For example: (1) Equitas Re and Equitas Ltd. are FSA Compensation Scheme Rulebook, §6.2.1 "relevant persons"; (2) it may be that the RRC 4, §3 product is an *ibid.*, §5.4.5(2)(a) "relevant general insurance contract", *viz.*, *per* FSA Glossary, "any general insurance contract other than: (a) a reinsurance contract; (b) a Lloyd's policy; (c) a contract falling within any of the following classes: (i) aircraft; (ii) ships; (iii) goods in transit; (iv) aircraft liability; (v) liability of ships; (vi) credit." *Per ibid.*, "general insurance contract" means "any contract of insurance within Part I of Schedule 1 to the Regulated Activities Order [Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544)] (Contracts of general insurance)".

⁶¹² Of the FSA Compensation Scheme Rulebook's various tests (see generally FSA Compensation Scheme Rulebook, §1.3.3), the EquitasRe-reinsured SYA participant is in principle an "eligible claimant" (*ibid.*, §4.2.2) but his RRC 4, §3 claim is not a "protected claim" because it is a reinsurance contract: *ibid.*, §5.4.5(1) read with §5.4.5(2) and FSA Glossary definition of "relevant general insurance contract", *viz.*, "any general insurance contract other than: (a) a reinsurance contract". Because his claim is not a "protected claim", Equitas Re, though an *ibid.*, §6.2.1 "relevant person" (because an *ibid.*, §6.2.1(1) "participant firm"), is not capable of being determined to be a "relevant person in default" under *ibid.*, §6.3.1(1) (because a "protected claim" does not exist in the first place: see *ibid.*, §§6.3.2, 6.3.3; and the apparently superfluous term "protected contract of insurance" at *ibid.*, §6.3.5) or under *ibid.*, §6.3.1(2)(a) (no "protected claim").

Sub-chapter 4: some basics of the Lloyd's enterprise

THE LLOYD'S ENTERPRISE GENERALLY

rudiments of insurance business at Lloyd's

3.72 The rudiments of insurance business ordinarily at Lloyd's can be non-exhaustively, indicatively summarised as follows:-

(1) insurance is sold at Lloyd's by each individual SYA participant — traditionally⁶¹³ in accordance with (for example) the SYA-level passivity rule,⁶¹⁴ the SYA-level separate contracts rule,⁶¹⁵ the SYA-level several liability rule,⁶¹⁶ the SYA-level collectivisation rule,⁶¹⁷ and the SYA-level united front rule.⁶¹⁸ Equitas Re as RRC 4, §3 outward reinsurer principal is merely one of a considerable number of outward reinsurers of SYA participants. The principal activity

⁶¹³ Some rules listed in the main text are not absolute in the case of substantial spoastic SYA participants, including the SYA-level passivity rule (the substantial spoastic SYA participant will have a close working relationship and structural relationship to its managing agency); the SYA-level collectivisation and SYA-level united front rules (in the case of a spoastic SYA participant there is nothing for the managing agency to collectivise or unite).

⁶¹⁴ The SYA-level passivity ensures that the SYA participant, for his part, has no control over his insurance business, no discretion as to a particular claim's disposition, and no choice whether to fund his personal-use funds when required to do so by his managing agency under SUA 1 / SCA 1 or relevant equivalent predecessor. He will never ordinarily be aware of a relevant judgment. Because of the configuration of personal-use funds, he will never be called on to pay it as such but merely to provide cash to the relevant personal-use fund.

⁶¹⁵ See p.75.

⁶¹⁶ Lloyd's Act 1982, s.8(1).

⁶¹⁷ The SYA-level collectivisation rule enables the managing agency to act once, uniformly, on behalf of all participants on a particular SYA. Its elements include (for example): (1) participants on the same SYA are permitted and required to be contractually active only as a unit. For example, the contracting parties to a particular insurance transaction must be every participant on a particular SYA or none of them. At the moment of the managing agency subscribing to a slip on behalf of participants on a particular SYA, or doing anything else on their behalf, separate contracts are simultaneously brought into existence between each SYA participant individually and the assured-at-Lloyd's. Each participant is to some extent an indistinct part of a collective whole; (2) as between participants on the same SYA (each of whom gives it identical SUA 1 / SCA 1 authority), the managing agency is required to deal with their relevant affairs uniformly and impartially. The managing agency is particularly prohibited from having regard to their identity, circumstances or other individual characteristics, from differentiating between them financially other than as to mere proportion, from differentiating between them legally concerning the terms of relevant contracts, or otherwise discriminating between them (if the managing agency is minded surreptitiously to benefit some participants on a particular SYA at the expense of the others, the baby SYA is the traditional device of choice). In an insurance transaction, the rule works in both directions: the managing agency collectivises all such participants in order not only to receive premium in but also, at the claims stage, to pay claims money out; (3) every participant on a particular SYA is bound equally by each of the managing agency's relevant acts and omissions, and particularly is a compulsory participant in every SYA-level transaction entered into on his behalf by the managing agency. No individual participant on a poly-stamp is permitted to deign to participate in some SYA transactions and their outcome and not in others: *Daly v Lime Street Underwriting Agencies Ltd.* [1987] FTLR 277, 280 (Staughton J): "Clearly the managing agents of a syndicate, and the active underwriter, would find it difficult to carry on business if they were liable to receive hundreds of anguished telephone calls every time that news of a major casualty appeared in the press." And see *ibid.*, 281: "There have been occasions in the past when the underwriting members of a syndicate have emerged from their backwoods and taken an active interest in its affairs. One example is the PCW affair. But they are rare and justified by some special reason." Relevant personal arrangements that a SYA participant may happen to make, such as PSLI, are incidental to those transactions, not in derogation of them.

⁶¹⁸ The united front rule operates principally in relation to third parties. Whether or not the managing agency happens for its own purposes to collectivise the individual affairs of participants on the same poly-stamp (under the SYA-level collectivisation rule or otherwise), the united front rule (a logical consequence of the passivity and SYA-level collectivisation rules) requires it to act in relation to third parties as if those participants were one person. For example, concerning business brought by Lloyd's brokers, the managing agency accepts or rejects on behalf of "the syndicate" (properly, the participants on a particular SYA) rather than a SYA's individual participants, engendering misleading myth about how insurance is sold at Lloyd's. A consequence of the rule is that the Lloyd's broker has no interest in, and (for purposes of discharging its duty to obtain the best insurance on the best terms) arguably no legal duty to ascertain, and — at least not without the resources of self-regulators at Lloyd's — no practicable means of ascertaining, the financial resources of any particular individual SYA participant.

of the Lloyd's enterprise⁶¹⁹ is the carrying on⁶²⁰ of insurance business by Members, solely as participants on one or more YAs of one or more syndicates in one or more UYs, over a period of at least three YORs per SYA.⁶²¹ The notion (whether substantive or as shorthand) that insurance is sold at Lloyd's by one or more syndicates is erroneous;

(2) in relation to the front office — *viz.*, as between himself and his assured-at-Lloyd's — the individual SYA participant is not — and commercially, administratively, financially and procedurally cannot practicably be and never is — personally relevant to the discharge of any of his own insurance liabilities. A SYA participant, whoever he is and whatever his personal and financial circumstances — including the nature and extent of his outward reinsurance, including to Equitas Re — is merely⁶²² a back-office conduit for infusing an insurance liability into, and to enable the assured-at-Lloyd's to directly or indirectly access, relevant personal-use and common-use claims payment securitisation trust and other funds at the Lloyd's enterprise. The notion that any assured-at-Lloyd's must collect from any SYA participant personally, *a fortiori*⁶²³ an EquitasRe-reinsured SYA participant, does not withstand informed examination;

(3) how, logistically, the Lloyd's enterprise provisions and provides relevant personal-use and common-use funds is a back-office matter for external insurance regulators and self-regulators-at-Lloyd's. Self-regulators-at-Lloyd's and or external insurance regulators may⁶²⁴ or may not⁶²⁵ require SYA participants to provide FAL or have other accessible assets; may⁶²⁶ or may not⁶²⁷ choose to require Members to contribute to the Central Fund; and may or may not require SYA participants to have⁶²⁸ or provide assets. Compliance with any such regulation is a back office matter between (among others) the individual SYA participant on the one hand and, on the other, such parties as the Corporation, his members' agency, and his managing agencies and generally⁶²⁹ of no concern to the assured-at-Lloyd's.

(4) Lloyd's properly so called is a mere corporation aggregate.⁶³⁰ Functionally, it is a mere trade association.⁶³¹

⁶¹⁹ For a thorough treatment of the Lloyd's enterprise, see *Astor's Law of Lloyd's*, 2nd Ed.

⁶²⁰ See the Corporation's four statutory objects at Lloyd's Act 1911, s.4.

⁶²¹ See incidentally Lloyd's Act 1911, s.4, the Corporation's own personal first formal object.

⁶²² See p.161.

⁶²³ See p.169.

⁶²⁴ In the case of a SYA participant in ordinary circumstances.

⁶²⁵ In the case of, for example, a RRC 1 Accepting Name.

⁶²⁶ In the case of, for example, certain contributions to the New Central Fund: see p.133.

⁶²⁷ In the case of, for example, certain contributions to the New Central Fund: see p.133.

⁶²⁸ No external insurance regulation requires any former Member to have any assets for any purpose: see p.169.

⁶²⁹ The EquitasRe-assured-at-Lloyd's, on the other hand, does need to be concerned to the extent that the Council appears to be under no express obligation to use the Central Fund to pay any EquitasRe-reinsured liability, and has purported to prevent itself using that fund for that purpose and to restrict its self-regulatory right to levy contributions to that fund from Members.

⁶³⁰ See p.137.

⁶³¹ See p.137.

myths

orientation

- 3.73 A considerable mythology has developed at Lloyd's, aided by the apparent absence in any jurisdiction of a comprehensive judicial consideration of the course of insurance business at Lloyd's. Numerous judicial pronouncements opining on the susceptibility to suit of a syndicate (properly so called) are self-evidently erroneous. Numerous judicial pronouncements opining on the liability of a SYA participant directly to an assured-at-Lloyd's, while correct in theory as to the front office, are misinformed as to the SYA participant's considerable back-office contractual responsibilities.

the SYA participant's relevance

- 3.74 Myths include: (1) any generation of conventionally outward-RTCed SYA participant, including the *originalis*, remains liable to the assured-at-Lloyd's on the RTCed insurance contract. By conventional RTC, the liability is comprehensively exfiltrated from the outward-RTCed SYA participant and comprehensively infiltrated into the inward-RTCing SYA participant. The former retains no trace whatever of any liability. (2) there is no distinction between the front office and the back office for liability purposes. The SYA participant's susceptibility to being the object of a collection suit by any assured-at-Lloyd's is based on a misunderstanding of the habitual course of business at Lloyd's. for his cufflinks cannot be correct as a front-office matter because the number of subscribers will be impracticably large for collection suit purposes, and, separately, his line will be inconsequential. It is presently believed that no SYA participant has ever been the subject of a collection suit. Several liability and how the Lloyd's enterprise pays claims are almost completely unconnected. It does not even hold true as a back-office matter: the SYA participant is liable not only to provide personal-use funds in accordance with quantum determined by Lloyd's Act s.8(1) severally, but also under the Rulebook at Lloyd's (which, coincidentally, never stipulates joint liability) to contribute to a variety of common-use funds. It is his relevant members' or managing agency which sues him on the appropriate agency agreement, or the Corporation which sues him on the General Undertaking and relevant Rulebook at Lloyd's provisions (all of which are of a contractual character). A collection suit against a SYA participant is unheard of. Judgment in a coverage suit against a SYA participant is never discharged.

who sells insurance at Lloyd's

- 3.75 Myths include: (1) Lloyd's is "licensed"⁶³² to sell insurance. Lloyd's is not "licensed"⁶³³ to sell insurance anywhere; (2) Lloyd's sells insurance. The Corporation is not⁶³⁴ an express party to any insurance contract made by any SYA participant, to which extent Scrutton LJ⁶³⁵ was correct. Insurance is bought at Lloyd's, not from Lloyd's. The Corporation's direct liability on such a contract does not appear to have been judicially determined;⁶³⁶ (3) Lloyd's personally funds

⁶³² See for example Corporation RA fye December 31, 1999, p.34 ("Chief Executive Officer's report"; "... the trading licences ...").

⁶³³ Another sense in which "licence" is infelicitous is that the term is believed to be not generally used, terminologically or conceptually, by external insurance regulators in any jurisdiction (*cf.* "admitted", "authorised", "regulated", etc.).

⁶³⁴ The Corporation has emphasised that LPSO provides policy signing and issuing services as each SYA participant's agent, not as a principal. And see 1974 LPSO Agreement.

⁶³⁵ *Rozanes v Bowen* (1928) 32 Lloyd's List Law Reports 98, 101 (Scrutton LJ): "[I]t cannot be too clearly understood by those who do not know anything about it that Lloyd's does not insure; Lloyd's as such never insures; the corporation never insures. ... Lloyd's insures nobody and takes no liability."

⁶³⁶ See *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J), quoting a promotional pamphlet issued by self-regulators-at-Lloyd's to prospective assureds, which stated in part:-

It has justly been said that Lloyd's has solved the problem of combining individual energy, enterprise and initiative with the collective security of a corporate body. From this you will realize that Lloyd's is the largest insurance institution in the world.

At *ibid.*, 82-3 (Bailhache J):-

If I had to consider this question: what meaning does the pamphlet issued by Lloyd's Committee convey to a person who knows nothing about the business of Lloyd's and is making up his mind whether he shall insure with Lloyd's or whether he shall insure with the companies[,] and if I were asked whether a person reading that pamphlet ... would reasonably suppose

claims. It is exceptionally rare⁶³⁷ for the Corporation to fund PTFs or any other relevant personal-use or common-use fund whose governing instrument permits its use to pay claims.

“Society of Lloyd’s” etc.

3.76 The Corporation continues to be subjected to an effluxion of appellations devised and propagated by or on behalf of self-regulators-at-Lloyd’s: (1) “the Society” *simpliciter* to describe the Corporation,⁶³⁸ self-regulators-at-Lloyd’s,⁶³⁹ Members collectively,⁶⁴⁰ and or something not immediately discernible;⁶⁴¹ (2) “Society of Lloyd’s” to describe the Corporation,⁶⁴² self-regulators-at-Lloyd’s,⁶⁴³ and⁶⁴⁴ or Members collectively,⁶⁴⁵ or nothing readily discernible;⁶⁴⁶ (3) “Corpora-

that the Committee of Lloyd’s stated there and offered that if he would insure with Lloyd’s the Corporation of Lloyd’s would be answerable for his insurances, I should consider the question a question of very great difficulty, ... which would have to be decided, not on the one or two erroneous statements in it but upon what is the true effect of the whole pamphlet.

The judge found that the pamphlet, not dissimilar to ones recently issued by self-regulators-at-Lloyd’s, contained statements, some “which, I think, might be calculated to mislead”: *ibid.*, 83. And see *Rozanes v Bowen* (1928) 32 Lloyd’s List Law Reports, 98 (CA); *Portavon Cinema Co. Ltd. v Price and Century Insurance Co. Ltd.* [1939] 4 All ER 601.

⁶³⁷ See *Astor’s Law of Lloyd’s*, 2nd Ed.

⁶³⁸ For: (1) legislative error, see for example Lloyd’s Act 1871, ss.10, 11, 20, 24, 31, 32, 36, 40; Lloyd’s Act 1911, recitals [2], [4], [5], [6], [7], ss.3, 4 and 7; Lloyd’s Act 1982, ss.3(2), 6(1), 6(4), 14(2)(a)(i); Sch. 1; see also the definition of “the Society” at Lloyd’s Act 1982, s.14(6). And see Insurance Premium Tax Regulations 1994 (1994 SI 1774), §2(1) (“In these Regulations ... “Lloyd’s” means the society incorporated by section 3 of Lloyd’s Act 1871”); (2) judicial error, see for example *Lloyd’s v Fraser* [1999] Lloyd’s Rep IR 156, 158 (Hobhouse LJ; “[I]t must be accepted that it is of importance to the Society that it should recover the sums which it says are owing to it”); (3) self-regulatory error, see for example Byelaw 20 of 1998, §2(5) (“The Society may provide any service ...” — a perfect illustration of the “Society”-“Corporation” canard). Recently, see for example *Brokers: Nat. Reg. Handbook 1998*, p.1 (“the interests of policyholders, the Society, its members ...”); italics added; Corporation RA fye December 31, 1999, p.36 (“The Society’s financial position continues to improve. ... The accounts show an operating deficit of £9m” — clearly referring to the accounts and deficit of the Corporation, as confirmed at *ibid.*, p.44 (the Corporation’s “Consolidated revenue account”); (4) other error, see for example April 10, 1997 letter from DTI’s Insurance Directorate to personal representatives of deceased Members (“You may be aware that the Department has introduced arrangements to regulate members of Lloyd’s who leave the Society after reinsuring their underwriting liabilities with Equitas”).

⁶³⁹ General Meeting of Members of Lloyd’s, Wednesday 22nd June 1983, Statement by Sir Peter Green, Chairman, p.1 (“[T]he Society has scrupulously protected the interests of Lloyd’s policyholders”).

⁶⁴⁰ For legislative use, see for example Lloyd’s Act 1871, s.24 (“The Society from time to time, by resolution of a general meeting...”, clearly an error for “members of the Society”, a phrase that the draftsman does use at *ibid.*, ss.10, 11, 20, 24, 31, 32, 36 and 40) and s.26 (“Byelaws made by the Society ...”; ditto) (both repealed by Lloyd’s Act 1982, s.15(1)(a) and *ibid.*, Sch 3). Significantly, “Society” was not used in any R&R Contract to describe Members collectively, but it was so used in S&M, §40 (p.14; “What Lloyd’s is ... trying to achieve through R&R is the opportunity for Names to buy a more limited form of “finality” through reinsurance into Equitas, and to make the price of that more affordable by redistributing to some extent the losses across the Society as a whole ...”).

⁶⁴¹ As at Lloyd’s Act 1871, Schedule (“The Fundamental Rules of the Society”), which are not rules concerning the Corporation, to which extent “Society” is used inconsistently in that Act; *SOD*, the then Chairman of Lloyd’s July 30, 1996 cover letter, first unnumbered page (“discussion and negotiation with all sections of the Society”); *ibid.*, the Corporation’s then CEO’s July 30, 1996 cover letter, p.ii (“the Society would be unlikely to meet the DTI’s members’ level solvency tests”); *ibid.*, p.123-4 (apparently two or three different meanings of “Society”); *ibid.*, p.135 (“put the Society into run-off”); the various uses of “best interests of the Society”.

⁶⁴² For use in: (1) litigation, see recently for example *Society of Lloyd’s v Jaffray* [1999] Lloyd’s Rep IR 182 (Colman J); *Garrow v Society of Lloyd’s* [2000] Lloyd’s Rep IR 38 (CA), *ibid.*, [1999] Lloyd’s Rep IR 482 (Jacob J); *McAllister v Society of Lloyd’s* [1999] Lloyd’s Rep IR 487 (Carnwath J). The Corporation sues using the fictitious name “Society of Lloyd’s”: see for example Corporation RA fye December 31, 1999, p.36 (“... the ongoing legal costs of defending the Society against litigation and pursuing debt recovery”); (2) official documents: see the comprehensive confusion in numerous of the Corporation’s subsidiaries’ annual accounts and 363s annual returns. The inconsistency appears to be merely careless rather than political; (3) internal self-regulatory instruments, see for example General Undertaking (heading, §(2)); MA 1; Byelaw 13 of 1987, Sch 1 (definition of “the Society”); (4) Corporation documentation, see for example Corporation RA fye (for example) December 31, 1996 etc., Chairman’s statement, *passim*. For legislative mis-use, see for example Financial Services Act 1986, s.42.

⁶⁴³ For judicial mis-use, see *Lloyd’s v Leighs* [1997] CLC 1398, 1399 (CA; “challenges to the legitimacy of acts of the Society of Lloyd’s”).

⁶⁴⁴ See for example GR 1996, p.20-1 (“Security underlying policies issued at Lloyd’s: financial data as at 31 December 1996”, Part IV (“Total net resources of the Society of Lloyd’s”).

⁶⁴⁵ See for example *S&M*, §65 (p.23; “The Society of Lloyd’s has to pass two different solvency tests ...”).

tion of Lloyd's" to describe the Corporation,⁶⁴⁷ or nothing readily discernible;⁶⁴⁸ (4) "Society and Corporation of Lloyd's" apparently to describe Members and the Corporation respectively,⁶⁴⁹ or possibly some third body⁶⁵⁰ (leading to some interesting difficulties in reconciling the two); (5) the curious recent "Society incorporated by Lloyd's Act 1871 by the name of Lloyd's".⁶⁵¹ All the foregoing appellations, which cause (presumably intentionally⁶⁵²) thorough confusion and misunderstanding, are multiply bogus: (1) the Corporation's name: only "Lloyd's" *simpliciter*⁶⁵³ correctly denotes the Lloyd's Act 1871, s.3 corporation of that name, and it properly denotes nothing else.⁶⁵⁴ There is no relevant body whose legal name is "Society of Lloyd's", "Corporation of Lloyd's" (the Corporation's alleged separate administrative component, usually called "the Corporation of Lloyd's", is fictitious), "Society and Corporation of Lloyd's", "Society incorporated by Lloyd's Act 1871 by the name of Lloyd's", or "Lloyd's of London". No such name is bestowed on any relevant person or thing by any relevant⁶⁵⁵ part of Lloyd's Acts 1871-1982 or by any other legal document; (2) number of bodies: "Society and Corporation" is erroneous: only one⁶⁵⁶ person was created by Lloyd's Act 1871, s.3; (3) nature of the Corporation: since a corporation is fundamentally different from a society,⁶⁵⁷ and separate⁶⁵⁸ too from its members, the

⁶⁴⁶ For example, the objects of the recently formed Lloyd's Market Association include "to promote the interests of the Society of Lloyd's": the context does not assist as to what entity or thing is meant: <http://www.lloydsolondon.co.uk/directory/associations/body.htm> (August 8, 1999). And see recently *Reg. Plan 1999*, p.10.

⁶⁴⁷ See for example Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 1993 (1993 SI 3245), Reg. 4(4)(b)(ii) ("the net assets of the Corporation of Lloyd's"); Insurance Accounts Directive, Annex, §B.3(b)2. For egregious error, see Lloyd's of London Limited (registered number 3189123), fye December 31, 1996, p.3 ("The company is a wholly owned subsidiary of the Corporation of Lloyd's which is incorporated ... under the Lloyd's Act 1871-1982"; *ibid.*, fye 31 December 1997, p.4; *ditto* in Lloyd's America Limited (registered number 3189026), RA fye December 1996 and fye December 1997.

⁶⁴⁸ See for example *Encyclopedia Britannica* entry "Lloyd's of London" as at February 6, 2000 ("Lloyd's of London, formally Corporation Of Lloyd's, international insurance marketing association ...").

⁶⁴⁹ See for example *In the Matter of Brooks and Dooley*, Case No. 8401/4, Decision of the Disciplinary Committee, §91(f). *RTFR*, §2.2 (p.25). The phrase is especially egregious given the unambiguous use of "Society" throughout Lloyd's Acts 1871-1982 to mean the Corporation.

⁶⁵⁰ See for example Additional Securities RA fye December 31, 1999, p.1 ("Report of the directors 1999"): "The Company is wholly owned by the Corporation of Lloyd's. Each member of the Society of Lloyd's enters into an agreement with the Company".

⁶⁵¹ See for example RRCs 0, 1, 2, 3, 4, 8, 10, etc.; *B. S. Lyle Ltd. v Rosher* [1959] 1 WLR 8, 10 (Lord Kilmuir LC).

⁶⁵² One proper approach in designating the Corporation, mindful of endemic colloquial error, would be "Lloyd's (the Lloyd's Act 1871, s.3 corporation)". To invent "Corporation of Lloyd's", "Society of Lloyd's" and "Society and Corporation of Lloyd's" is unnecessary.

⁶⁵³ The familiar phrases "Society of Lloyd's", "Corporation of Lloyd's" and "Society and Corporation of Lloyd's" are all bogus: see p.184.

⁶⁵⁴ See Lloyd's Act 1871, s.3: "... hereby incorporated by the name of Lloyd's, and by that name shall be one body corporate ..." (italics added). And see Lloyd's Act 1911, first recital; Lloyd's Act 1951, first recital; Lloyd's Act 1982, recital, §(1). For correct legislative use, see for example Insurance Companies Act 1982, ss.2(2)(a), 15(4), 75, 78, 83(4), 83(6), 83(7), 84-86. On the use of the single word Lloyd's to describe the *former establishment or society* of Lloyd's, see, for example, Lloyd's Act 1871, long title and first recital. The argument that "Corporation of ..." is appropriate to distinguish the Corporation from Members collectively is similarly bogus.

⁶⁵⁵ Of the five phrases, only "Society of Lloyd's" actually appears in Lloyd's Acts 1871-1982 — viz., Lloyd's Act 1871, recital [7]; s.2, and twice in s.42 — always to refer to the pre-Lloyd's Act 1871 *unincorporated* society. The word "Society" *simpliciter* is used throughout Lloyd's Acts 1871-1982 (starting with Lloyd's Act 1871, s.3) as a bizarre abbreviation for the Corporation.

⁶⁵⁶ Viz., "... are hereby *united*..." (although nothing is actually being united) and "... shall be *one* body corporate". The contradiction "... are hereby *united* into a Society and Corporation" is corrected in all subsequent Lloyd's Acts ("Society or Corporation"); see for example Lloyd's Acts 1911, 1951 and 1982, first recitals: "[B]y Lloyd's Act 1871 ... certain persons were united into a Society *or* Corporation". And see "Establishment *or* Society" in the 1811 trust deed. Italics added. This is not the only possible legal configuration for a corporation: see for example the Mayor and Commonalty and Citizens of the City of London.

⁶⁵⁷ See p.184.

⁶⁵⁸ For example, Lloyd's Act 1911, s.4 objects are not those of Members individually or collectively. And see the logical point behind Lloyd's Act 1871, s.40.

statutory⁶⁵⁹ abbreviation “Society” is misconceived,⁶⁶⁰ yet Lloyd's Act 1871, s.3's error has been repeated in all subsequent Lloyd's Acts and in all external insurance statutes and statutory instruments dealing with the Lloyd's enterprise.

regulation

- 3.77** Myths include: (1) Lloyd's has self-regulatory powers in its own right.⁶⁶¹ The Corporation has no primary self-regulatory powers whatever; (2) Lloyd's byelaws are subordinate legislation. Lloyd's byelaws are not legislation; (3) any component of the Lloyd's enterprise, including Lloyd's, is immune from suit.⁶⁶² No component of the Lloyd's enterprise has any immunity whatever from any suit.

corporate Members trade with limited liability

- 3.78** Myths include that a corporate Member trades with limited liability (whatever that means). In reality, the corporate and natural Member each sells insurance at Lloyd's with identical exposures.

syndicates

- 3.79** Myths include: (1) a syndicate sells insurance or otherwise trades; (2) Members join syndicates; (3) Members sell insurance, or otherwise trade, through, or by participating in, syndicates; (4) a syndicate has members. Participation in syndicates is one of the most pervasive and pernicious of all myths at Lloyd's. Every instance of an assured-at-Lloyd's bringing a coverage⁶⁶³ suit against a syndicate or SYA, in any forum in any jurisdiction, appears to demonstrate the plaintiff's misconception of how insurance is sold at Lloyd's.⁶⁶⁴ The Rulebook's at Lloyd's own definition of “syndicate” is sometimes vague,⁶⁶⁵ while attempts at Lloyd's (if any⁶⁶⁶) to distinguish between a syndicate and a SYA are sometimes overly complex,⁶⁶⁷ inconsistent,⁶⁶⁸ non-existent,⁶⁶⁹

⁶⁵⁹ See Lloyd's Acts 1871-1982, *passim*.

⁶⁶⁰ Perhaps, as was judicially ventured in another context, “the draftsman of the Act used the wrong word in order to maintain the tradition of obscurity”: *Forestal Land, Timber and Railways Company, Ltd. v Rickards* (1940) 68 Lloyd's List Law Reports 45, 63 (MacKinnon LJ).

⁶⁶¹ See p.199.

⁶⁶² Presumably based on a misreading of, or credulity of ignorant gossip concerning, Lloyd's Act 1982, s.14.

⁶⁶³ While it can rarely if ever be properly argued that a syndicate or SYA insures, a syndicate may arguably be (and in practice is treated as) an appropriate accounting unit for certain set-off purposes: see p.75.

⁶⁶⁴ Syndicates, SYAs and SYA participants are considered in detail at *Astor's Law of Lloyd's*, 2nd Ed.

⁶⁶⁵ See for example Byelaw 4 of 1984, §1(c)(ii):-

Where a managing agent manages two or more syndicates which comprise the same members with the same individual participations, those syndicates may for the purposes of any conditions and requirements ... be grouped together and treated as a single syndicate.

Adding to the confusion, the byelaw does refer to SYAs elsewhere, such as at *ibid.*, §11(a), definition of “run-off syndicate”, *viz.*, “a syndicate which no longer accepts new or renewal insurance business (other than the variation or extension of risks previously underwritten, or reinsurance to close an earlier year of account of that syndicate”; *ibid.*, §1(d) (“For the purposes of this byelaw a year of account of a syndicate shall be treated ... [etc.]”). See also for example SMA 2, §16.2:-

The Name and the [members' agency] acknowledge that the association between the members of a syndicate for a year of account is made solely for the purposes of, and is limited to, the underwriting of insurance business allocated to that year of account and matters arising out of or in connection with insurance business so underwritten, and nothing in this Agreement shall be taken to create or give rise to any longer or further association or to constitute the syndicate as an entity continuing from year to year.

⁶⁶⁶ See for example the evidence from self-regulators at Lloyd's at *MPs' Interests*, p.5 *et seq.* (an opportunity missed to clarify syndicates and SYAs in a Parliamentary inquiry touching precisely that distinction). Because of horizontal and vertical accumulation and the meaninglessness at Lloyd's of “year” *simpliciter*, evidence directly relating to SYAs is unclear and misleading (see for example *ibid.*, p.6-7, §10).

⁶⁶⁷ See for example Byelaw 19 of 1997, Schedule, definition of “succeeding year of account” (“in relation to a calendar year and the year of account corresponding to that calendar year, the year of account corresponding to the next following calendar year”); Byelaw 4 of 1984, §1(c)(i) (“the several groups of underwriting members to which in different years a particular syndicate number is assigned by or under the authority of the Committee shall be treated as the same syndicate,

and or confusing.⁶⁷⁰ Use by self-regulators at Lloyd's of "syndicate" is sometimes incorrect⁶⁷¹ or multiply misleading.⁶⁷² In particular, "syndicate" is misused at Lloyd's and elsewhere to describe a SYA,⁶⁷³ the separate YAs of a particular syndicate,⁶⁷⁴ SYA stamps collectively,⁶⁷⁵ SYA partici-

notwithstanding that they may not comprise the same underwriting members with the same individual participations"); SMA 2, §1.2:-

(a) For the purpose only of interpreting references in this Agreement to a syndicate and like expressions, and subject always to clause 16.2, unless the context otherwise requires: (i) the several groups of underwriting members of Lloyd's to which in successive years a particular syndicate number is assigned by the Council shall be treated as the same syndicate, notwithstanding that they may not comprise the same underwriting members with the same individual participations (and where two or more numbers are assigned to a group of underwriting members, the number which appears first on the list of syndicates published by the Council and specified by the Council for the purposes of this paragraph shall be the number taken into account for the purposes of this paragraph); and (ii) references to assets or liabilities of a member of a syndicate, or to anything done by or to a member of a syndicate or by or to any person on his behalf, shall be construed as references to assets employed or liabilities incurred by him, or to things done by or to him or such other person on his behalf, in the course of or in relation to the underwriting business carried on by him through that syndicate.

This definition does not properly indicate that "successive years" is to be understood in the sense of "successive YAs" rather than "successive calendar years". Sometimes the Rulebook at Lloyd's does not even refer to years of account correctly: see for example Byelaw 2 of 1995 ("run-off accounts" to refer to run-off *years of account* — although see *ibid.*, Sch 1, §1 (relevant definitions)).

⁶⁶⁸ See for example Byelaw 11 of 1994, definition of "syndicate" at *ibid.*, Sch. 1, use of "year of account" at *ibid.*, §6(1), and the meaningless use of "syndicate" at *ibid.*, §3(2). Cf. for example Byelaw 18 of 1994, §2(1) ("Every year of account of a syndicate"), and mis-use again at *ibid.*, §7(1)(d)(i) ("at least 30% of the syndicate's written gross premium income") (for the byelaw's contextually defective definition of "syndicate", see *ibid.*, Schedule 1 ("a group of members of Lloyd's or a single corporate member underwriting insurance business at Lloyd's through the agency of a managing agent to which a particular syndicate number is assigned by or under the authority of the Council")). See also the highly confusing definition in Byelaw 19 of 1997, Schedule, §1, of "syndicate allocated capacity" ("... the aggregate of the member's syndicate premium limits of all the members for the time being of the syndicate together with the member's syndicate premium limit of any person who was a member of the syndicate on 1 January but who has subsequently died"; a syndicate *per se* cannot have participants; only a SYA can).

⁶⁶⁹ See for example <http://www.lloyds.com.directory/uw/body.htm> (July 13, 1998: "Some managing agents may be responsible for several syndicates of similar or different classes, each of which will have its own separate identity for administrative and accounting purposes"), giving the misleading impression that no further identification is necessary. See also <http://www.lloyds.com/businfo/hmw/glossary.htm> (July 13, 1998: "Members of Lloyd's are grouped into syndicates each of which is represented by a professional underwriter who accepts risks on behalf of the whole syndicate"), giving the impression that syndicates, rather than SYAs, are the collectivity device.

⁶⁷⁰ See for example Byelaw 11 of 1994, *passim*; Byelaw 13 of 1990, Sch. 1, §3(2) ("Where a managing agent manages two or more syndicates ...").

⁶⁷¹ See for example "Memorandum submitted by Lloyd's of London" at *MPs' Interests*, p.1, §2 ("[M]embers organise themselves into syndicates"); Mkt. Bn. September 8, 1997 ("deposit drawdowns post R&R"), p.1 ("For Names who have signed 'new style' trust deeds, [the] Council's discretion may be exercised under delegated powers and any delays in moving realised funds to syndicates").

⁶⁷² See for example the definition of "Syndicate" at LATD, §1.28 ("a group consisting of Underwriting Members of Lloyd's, to which a particular number has been assigned by or under the authority of the Council, for whose account an underwriter accepts insurance or reinsurance business at Lloyd's"). The definition, which continues the tradition of confusing syndicate with SYA, is erroneous. The underwriting collectivity is the SYA, not the syndicate. The number is assigned to the syndicate, not to the SYA. What constitutes and distinguishes SYAs is not the syndicate number but the UY.

⁶⁷³ For: (1) legislative error, see for example Insurance Premium Tax Regulations 1994 (1994 SI 1774), §8(1) ("Where a taxable business is carried on by persons who are underwriting members of Lloyd's who are members of a syndicate of such underwriting members; (2) judicial error, see for example *Denby v English and Scottish Maritime Insurance Co. Ltd.*, *Yasuda Fire & Marine Co. of Europe Ltd. v Lloyd's Underwriting Syndicates* 209, 356 *et al.* [1998] CLC 870, 877 (Hobhouse LJ); *Touche Ross & Co. v Baker* [1992] 2 Lloyd's Rep. 207, 209 (Lord Mustill; "business is conducted ... through the medium of syndicates"; it is not); *John Hayter Motor Underwriting Agencies Ltd. v RBHS Agencies Ltd.* [1977] 2 Lloyd's Rep. 105, 106 (Goff LJ; "A syndicate consists of a number of names ..."; it does not); (3) external regulatory error, see for example the Intending Agent's Deed Poll for Australian business, recital A ("the underwriting business of the Relevant Underwriter as a member of a syndicate"); and see the confusion at *NAIC Review* 1998, p.29; (4) Rulebook at Lloyd's error, see for example SUA 1 / SCA 1, §1.1, definitions of "Managed Syndicate" ("a syndicate of which the Name is a member and in respect of which the Agent is the managing agent") and "Syndicate" ("a group of underwriting members of Lloyd's underwriting insurance business at Lloyd's through the agency of a managing agent to which a particular syndicate number is assigned by the Council" — Members do not congregate in syndicates and the Council does not assign a particular number to a SYA); and see the hapless definition at RRC 4, Sch. 2, §1 ("Syndicate means each of the *syndicate years of account* listed in schedule 1 to this Agreement"; italics added); Byelaw 4 of 1984, §1(a) (definition of "syndicate") and *ibid.* (definition of "run-off manager"). The terminology at Byelaw 4 of 1994, §8(3) (definition of "run-off syndicate" read with *ibid.*, Schedule, §2(3)) is particularly defective. See also for example Mkt. Bn. Y1034, December 4, 1998 ("31 December 1998: LATF dollar solvency test — dollar spot forms"), p.2.

pants generally,⁶⁷⁶ participants on one or more particular YAs of a particular syndicate⁶⁷⁷ (an error especially egregious in relation to arguments concerning set-off with a third party), partici-

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See for example Byelaw 4 of 1994, Schedule, §2(3):-

For purposes of this byelaw the several groups of underwriting members to which in different years a particular syndicate number is assigned by or under the authority of the Council shall be treated as the same syndicate, notwithstanding that they may not comprise the same underwriting members with the same individual participations.

This definition occurs elsewhere in the Rulebook at Lloyd's and should be treated with caution. And see for example Byelaw 13 of 1990, Sch. 1, §3(1):-

In this byelaw ...: (a) the several groups of underwriting members to which in different years a particular syndicate number is assigned by or under the authority of the Committee shall be treated as the same syndicate, notwithstanding that they may not comprise the same underwriting members with the same individual participations [etc.].

Note among other infelicities the indistinct use of "years", intended to mean UYs rather than calendar years. A syndicate number tends to stick to the syndicate from UY to UY, and does not change "in different years". See similarly *ibid.*, §3(2).

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As in Byelaw 11 of 1994, *passim*.

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See for example *SOD*, App. 5, §1.11 ("The Reinsurance Contract [RRC 4] will be mandatory. It will entered into on behalf of each syndicate by the Substitute Agent ..." — no syndicate entered into RRC 4; AUA 9 did not represent any syndicate); RRC 4, §3.1 ("[Equitas Re] shall ... reinsure and indemnify each and every Syndicate and each Closed Year Syndicate ...") and *ibid.*, Sch. 2, §1, definition of "Syndicate" and "Closed Year Syndicate". And see *Aneco Reinsurance Underwriting Ltd. (in liquidation) v Johnson & Higgins Ltd.* [2000] Lloyd's Rep IR 12, 32 (Aldous LJ; "1989/1990 was a year of disasters which lead to huge claims having to be met by Lloyd's syndicates").

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For legislative error, see for example Insurance Companies Act 1982, Sch. 2E, §1(6)(a) ("the name or number of the syndicate which is to enter into the contract ..."); Insurance Accounts Directive, Annex, §A ("Lloyd's syndicates shall prepare annual accounts"; syndicates do not prepare anything; SYA participants' accounts are prepared by the managing agency). For judicial error, see for example *Kusel v Atkin (The "Catariba")* [1997] 2 Lloyd's Rep. 749, 751 (Colman J; "The plaintiff was the owner of a large motor catamaran called Catariba. The vessel was insured by the defendant and other members of a Lloyd's syndicate"); *Mander v Commercial Union Assurance Co. PLC* [1998] Lloyd's Rep IR 93, 97 (Rix J; "Mr Colin Mander ... is a representative underwriter of a Lloyd's syndicate, syndicate 552. His syndicate together with other Lloyd's syndicates subscribed to a number of open covers ..."; and see *a fortiori ibid.*, 98: "There is some controversy about whether Mr Mander can properly represent the syndicates other than syndicate 552, or whether those syndicates are themselves plaintiffs I can regard the scheduled syndicates as being plaintiffs ..."; for failure to distinguish between a syndicate and a SYA, see *ibid.*, 99); *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyd's Rep. 132, 134 (Kerr LJ; "Ultimately Mr. Bragg agreed on behalf of his syndicate to write a line ..."); *Brice v J. H. Wackerbarth (Australasia) Pty. Ltd.* [1974] 2 Lloyd's Rep 274, 274 (Denning MR; "The plaintiffs are underwriters of a syndicate at Lloyd's"); *Everett v Hogg, Robinson & Gardner Mountain (Insurance) Ltd.* [1973] 2 Lloyd's Rep. 217, 217-218 (Kerr J; "In this case the plaintiff is suing as a representative underwriter on behalf of Lloyd's Syndicate no. 558. This is a well-known non-marine syndicate, formerly known as the T. A. Williams Syndicate and now led by Mr. E. B. Edmunds. ... For convenience I will refer to the plaintiff as "the Syndicate" — an approach which leads to unintelligibility at *ibid.*, 222 ("loss sustained by the Syndicate ... the Syndicate is right ...")); *Macmillan v A.W. Knott Becker Scott Ltd.* [1990] 1 Lloyd's Rep. 98, 100 (Evans J; the defendant "is alleged to have been negligent towards ... an underwriting syndicate ... for whom it acted under a binding authority"); *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd's Rep. 618, 642 (Potter J; "The relationship of a managing agent with the syndicate which it manages ...", mischaracterising the legal and factual position); *ibid.*, {2b} [1996] 2 Lloyd's Rep. 577, 578 (Neill LJ); *Callaghan v Thompson* [2000] Lloyd's Rep IR 125, 127 (David Steel J; "The defendants were a Lloyd's Underwriting syndicate ..."; note the capricious use of uppercase). *Cf.* the correct approach demonstrated at *Judd v Merrett* [1997] LRLR 21, 22 (Leggatt LJ; "The plaintiff, Mr. Judd (suing on his own behalf and on behalf of all members of Lloyd's Syndicate 164 for the 1980 year of account) appeals ... against the order of Mr. Justice Gatehouse ... when he ordered that the defendants, Mr. Stephen Merrett (sued on his own behalf and on behalf of all members of Lloyd's Syndicates 417 and 421 for the 1983 year of account) and the second and third defendants, Mr. Richard Outhwaite (sued on his own behalf and on behalf of all members of Lloyd's Syndicate 661 for the 1983 and 1982 years of account) ..."). And see *Hiscox v Outhwaite (No. 3)* [1991] 2 Lloyd's Rep. 524, 526 (Evans J); *Youell v Bland Welch & Co. Ltd.* [1992] 2 Lloyd's Rep. 127, 131 (Staughton LJ). For insurance contract error, see for example NMA 1779 (slip policy):-

We the Underwriters, members of the Syndicate(s) referred to in the Slip, whose names and respective proportions of the amount subscribed by the respective Syndicates ... and in respect of his due proportion only ...

A correct approach is reflected at *Royal Exchange Assurance v Company Naviera Santi, SA (the "Tropaioforos")* (No. 2) [1962] 1 Lloyd's Rep. 410, 413 (Megaw J; the ship was insured by "Indemnity Marine Assurance Company, Ltd., 53 other insurance companies and 2094 underwriters at Lloyd's" — the judge makes no fanciful mention of any syndicates and uses no incorrect abbreviations). For self-regulators at Lloyd's error, see for example Byelaw 5 of 1989, Sch. 1 ("syndicate" means a group of underwriting members ...); Byelaw 2 of 1986, §3 ("... the managing agent shall not permit a syndicate managed by it to place ... insurance business ..."; the byelaw has no definition of "syndicate"); RRC 9, §1.1 ("Syndicate means a group of underwriting members of Lloyd's for whose account an active underwriter accepted or accepts insurance business at Lloyd's and which is a party to the Equitas Reinsurance Contract"; see for example its use at *ibid.*, §7.2(b)). See the confusion at for example *ibid.*, §7.1:-

Equitas [Ltd.] hereby confirms that, pursuant to the Equitas Reinsurance Contract [RRC 4], each Syndicate and Closed Year Syndicate to be reinsured by [Equitas Re] will assign the benefit of all of the right, title and interest of the Names or the Closed Year Names on the Syndicate or Closed Year Syndicate in the proceeds and the rights [etc.] ...

pants on all relevant YAs of a particular syndicate,⁶⁷⁸ a corporate Member,⁶⁷⁹ Members generally,⁶⁸⁰ sometimes the managing agency⁶⁸¹ of participants on a particular SYA, and sometimes nothing readily determinable.⁶⁸² Coincidental commonality of participants between YAs of a particular syndicate does not redeem the errors. Sometimes incorrect use of the word “syndicate” causes wholesale and expensive confusion,⁶⁸³ or absurdity.⁶⁸⁴ Outside the Lloyd's enterprise, the distinctions between a syndicate, SYA, SYA stamp, and SYA participants are widely overlooked, making technical discussion meaningless⁶⁸⁵ or materially misleading,⁶⁸⁶ and compromising ex-

For third-party misuse, see the title in *Insurance Company v Lloyd's Syndicate*, Times Law Reports, November 10, 1994 (Colman J). Occasionally the judge is more careful: see for example *Euro-Diam Ltd. v Bathurst* [1987] 1 Lloyd's Rep. 178 (Staughton J; “The defendant is sued as a representative underwriter upon a contract of insurance in favour of Euro-Diam subscribed on behalf of two syndicates at Lloyd's. I shall call him, perhaps with more sense than syntax, the insurers”).

678 See recently for example Reg. Bn. 5/200, January 12, 2000 (“General advance consents”), App. 1 (“Ordinary resolution made by Lloyd's Regulatory Board on 20 December 1999”), first unnumbered page, §(c) (“... approval has been obtained from members of the syndicate ...”).

679 See for example Mkt. Bn. Y1017, November 18, 1998 (“captive syndicates at Lloyd's”; “... Captive Syndicates are permitted to underwrite in the Lloyd's market ...”).

680 As apparently in *Provincial Insurance Co., Ltd. v Crowder* (1927) 27 Lloyd's List Law Reports, 30 (Branson J; “This is an action in which the plaintiffs are claiming under a reinsurance treaty entered into with two underwriting syndicates, Members of Lloyd's ...”).

681 For: (1) judicial error, see for example *Touche Ross & Co. v Baker* [1992] 2 Lloyd's Rep. 207, 214 (Lord Mustill; invocation of discovery extension clause in multiple policy), discussing “the need for the individual syndicate ... to be constantly reassessing its position in regard to its own strategies...”. And see *Aneco Reinsurance Underwriting Ltd. (in liquidation) v Johnson & Higgins Ltd.* [2000] Lloyd's Rep IR 12, 32 (Aldous LJ; “When claims were made in respect of the Bullen and Bohling Treaties, substantially all the Lloyd's syndicates who had written the six contracts sought to avoid them ...”); (2) Rulebook at Lloyd's etc. error, see for example Mkt. Bn. Y2487, February 13, 2001 (“1998 account distribution and all cash calls”), §1.3 (p.2; “any syndicate contemplating a cash call ...”); Reg. Bn. 121/98, December 21, 1998 (“Money laundering: significant issues arising from business conduct reviews”), fourth unnumbered page (“Many of the syndicates reviewed ... did not currently have a policy with regard to settling claims in a currency different to that used to pay premiums”); *Auditors: New Approach*, §4.11 (p.13; “Tripartite meetings with syndicates ...”); Reg. Bn. 059/98, June 22, 1998 (“Regulatory update”), Regulatory Update, Issue 1, unnumbered page, “The Business Conduct Review Department” (“[W]hilst a general review will focus on whether a syndicate ... remains fit and proper ...”). And see for example the multiply erroneous use of “syndicate” at *Code: UK Personal Lines*, p.3:-

For personal lines syndicates it is likely that the vast majority of risks written by the syndicate will not be seen by the active underwriter There is, therefore, a particular onus upon personal lines syndicates [the SYA stamp's managing agency] to ensure that there are appropriate limits on staff as to the level of risks that they can accept

Syndicates do not write anything or ensure anything.

682 As for example *Berns & Koppstein, Inc. v Orion Insurance Co. Ltd.* [1960] 1 Lloyd's Rep. 276, 278 (Judge Herlands; “The defendants represent certain members of two insurance syndicates known as Underwriters at Lloyd's and the Institute of London Underwriters ...”); Insurance Premium Tax Regulations 1994 (1994 SI 1774), §8(2) (“In determining whether premiums are received by any syndicate which has been registered in the manner described in paragraph (1) above no account shall be taken of any change in the members of the syndicate”). And see for example the use of “syndicate” at *The Eras Eil Actions* [1995] 1 Lloyd's Rep. 64, 71 (Potter J).

683 See the dispute underlying *Touche Ross & Co. v Baker* [1992] 2 Lloyd's Rep. 207, 210 (Lord Mustill).

684 See for example *Butcher v Dowlen* [1981] 1 Lloyd's Rep. 310, 311 (Stephenson LJ; “[T]he defendants in this action, Mr. Dowlen for himself and all other members of the underwriting syndicate known as B.J.S. Motor Syndicate at Lloyd's”); *Charman v Guardian Royal Exchange Assurance Plc* [1992] 2 Lloyd's Rep. 607, 609 (Webster J; “Accordingly the plaintiff, on his own behalf and on behalf of all other members of Syndicate 488 at Lloyd's ...”); *Abrahams v Mediterranean Insurance And Reinsurance Co. Ltd.* [1991] 1 Lloyd's Rep. 216, 234 (Parker LJ; “The nominal appellants (plaintiff) sued on behalf of himself and all the underwriting members of Syndicate 420 at Lloyd's. I shall hereafter refer to the appellant as “the syndicate”); *Phillips v Dorintal Insurance Ltd.* [1987] 1 Lloyd's Rep. 482, 483 (Steyn J; “In the first action the plaintiff is Mr. Albert Stratton who is suing on his own behalf and on behalf of all other members of syndicates 782, 424 and 497 at Lloyd's. In the second action the plaintiff is Mr. Anthony Phillips, who is suing on his own behalf and on behalf of all other members of syndicate 498 at Lloyd's”); *Pindos Shipping Corporation v Raven (The “Mata Hari”)* [1983] 2 Lloyd's Rep. 449, 450 (Bingham J; “The defendant is a Lloyd's underwriter sued as representative of Lloyd's Syndicates 691 and 689” — syndicates do not have representatives).

685 For legislative mis-use, see for example the first sentence of Directive 91/674/EEC, Annex, B, §1 (“[S]yndicate accounts shall be prepared ... for three underwriting years of account ... and shall comprise a separate underwriting year of account for each such year”) and *ibid.*, §9(b) in relation to run-off SYAs (failure to distinguish between SYAs and a SYA's trading years). *Ibid.*, 5(d), second indent is clearly wrong (“where a syndicate has paid a claim”). And see *ibid.*, §6(a) (“open years”) and (b) (“year of account is closed”). For judicial mis-use, see for example *Baker v Black Sea & Baltic General Insurance Co. Ltd. and Equitas Reinsurance Ltd.* [1998] 1 WLR 974, 976 (Lord Lloyd; “The plaintiff ... is a member of

ternal regulation.⁶⁸⁷ The notion⁶⁸⁸ that SYA participants act as “syndicates” is erroneous. Similarly unhelpful is any reference to insurance being sold by the “John Smith and others syndicate”, a common Market shorthand to refer to an active underwriter of and participants on a particular YA without the syndicate number and without the UY in which the syndicate’s relevant YA budded.⁶⁸⁹ The insurance practitioner should assume, unless otherwise obvious, that use of the word “syndicate” by self-regulators at Lloyd’s and others is erroneous, and that the word is intended to refer to something other than a syndicate. “What syndicate are you on?” and “what syndicate sold you insurance?” disclose fundamental misunderstanding

conventional RTC

- 3.80** Myths include: (1) RTC⁶⁹⁰ is reinsurance.⁶⁹¹ Commercial reality and a variety of back-office contracts at Lloyd’s render RTC incapable of being, nor does it appear ever to have been, treated as genuine⁶⁹² reinsurance. Among other reasons, the conventionally outward-RTCed SYA participant is incapable of ever suffering an insurable loss: the RTC transaction completely and irrevocably extricates the liability from his accounts; (2) any — including the first — generation of conventionally-outwardly-RTCed SYA participant continues to be liable to the assured-at-Lloyd’s. He does not because under the Rulebook at Lloyd’s he cannot.⁶⁹³

Lloyd’s Syndicate 947 (“the syndicate”). He sues on his own behalf, and on behalf of all other members of the syndicate. The defendant reinsurers ... reinsured the syndicate’); *Lloyd’s v Clementson* {2} [1997] LRLR 175, 189 (Cresswell J; “The cost of the services ... is charged to the syndicate”); *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 473 (Clarke J; reinsurance; the use of the word “syndicate” in the first paragraph of the judgment); *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265, 290 (Cresswell J; “[A]ttempts to compare one syndicate with another in terms of the impact of asbestos etc. are liable to be a trap for the unwary because no syndicate is the same as another. Every syndicate has a different historical background”); *Judd v Merrett* [1997] LRLR 21, 22 (Leggatt LJ; “Syndicate 164 claims under two reinsurance contracts ...”); *Daly v Lime Street Underwriting Agencies Ltd.* [1987] 2 FTLR 277, 278-9 (Staughton J; “The underwriting members are grouped together in syndicates, and participate in more than one syndicate”). For accounting regulatory mis-use, see for example PN 2, Section 2, §49: “The degree of subjectivity involved in the estimation of the reinsurance to close will vary from syndicate to syndicate”; *ibid.*, Section 6, §§1, 6 (references to “syndicates” giving waivers and undertakings). For other self-regulators at Lloyd’s error, see for example *SOD*, Appendix 5, §1.11 (Reinsurance Contract; “The Reinsurance Contract will be mandatory. It will be entered into on behalf of each syndicate”).

- ⁶⁸⁶ See for example the comprehensive confusion at *Denby v English and Scottish Maritime Insurance Co. Ltd., Yasuda Fire & Marine Co. of Europe Ltd. v Lloyd’s Underwriting Syndicates* 209, 356 *et al.* [1998] CLC 870, 877 (Hobhouse LJ, referring to two SYAs):-

It must be remembered that the two syndicates are distinct. Their membership will ordinarily be different; the lines of individual members may vary; the premium limits will probably be different; the authority of the professional underwriter may be different.

See also for example PN 2, Section 3, §7:-

The calculation of underwriting liabilities and the valuation of assets for solvency returns is carried out by each syndicate. The managing agent then submits the details ...[.]

Note the false distinction between “syndicate” and “managing agent”. And see the regrettable drafting at Council Directive 91/674/EEC, Annex, B, §1 and 9(b).

- ⁶⁸⁷ See for example the now obsolete Practice Direction: Estates of Deceased Lloyd’s Names [cite 11 21 97] (“all liabilities of the estate in respect of syndicates of which the Name was a member ...”). A recent example is *NAIC News*, March 1998 (“Task Force Approves Lloyd’s Funding Level Reduction”), which refers, almost meaninglessly, to “syndicate years 1995, 1996 and 1997”: <http://www.naic.org/geninfo/news/naicnews/mar98br.htm> (July 13, 1998).

- ⁶⁸⁸ See for example *Baker v Black Sea and Baltic General Insurance Co. Ltd.* [1995] LRLR 261, 278 (Potter J; “[W]hile underwriters subscribe insurance and acquire obligations as individuals, they act for the purpose of their business with third parties (whether assureds or reinsurers) as numbered syndicates”).

- ⁶⁸⁹ It would help to refer to SYA 1 for the 2000 UY as, for example, 1-2000. Incredibly, some such system is unknown at Lloyd’s.

- ⁶⁹⁰ RTC is fully described at *Astor’s Law of Lloyd’s*, 2nd Ed.

- ⁶⁹¹ See for example SUA 1 / SCA 1, §5(d)(i): “the reinsuring members agree to indemnify the reinsured members against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through the Managed Syndicate and allocated to the earlier year”.

- ⁶⁹² It is treated cosmetically as reinsurance at Lloyd’s: for example a “premium” is paid; the transaction is processed as if it were insurance by LPSO.

- ⁶⁹³ See p.207.

homogenous “chain of security” and the SYA participant's relevance

- 3.81** Myths⁶⁹⁴ include: (1) the personal-use funds of one SYA participant are available to discharge the insurance liabilities of another SYA participant; (2) there is otherwise no distinction for claims payment securitisation purposes between personal-use and common-use funds. In reality, the Central Fund and the Corporation's personal assets aside, a SYA participant's liability at Lloyd's is generally discharged only from particular discrete personal-use and common-use, dedicated and not-dedicated, trust and other claims securitisation funds. The particular availability of each fund is determined by its governing instrument. Listing⁶⁹⁵ all those funds together without relevant distinction so as to insinuate that they are available communally, homogenously or otherwise without regard to their governing instruments is pernicious; (3) an assured-at-Lloyd's will ever have to collect from a SYA participant (outwardly-RTCD or not). The notion contravenes all relevant representations by self-regulators-at-Lloyd's, all relevant external insurance regulation, all relevant personal-use and common-use claims payment securitisation at Lloyd's, all back-office cash flow devices at Lloyd's, and probably relevant law.

other myths

- 3.82** Other myths include (for example): (1) a corporate SYA participant is not a sole trader.⁶⁹⁶ A corporate Member is no less a sole trader than a natural Member; (2) the sole purpose of FAL, cash calls and Central Fund appropriations is to pay claims;⁶⁹⁷ (3) the amount of a Member's FAL, Lloyd's Deposit, OPIL or deployed PIL determines, limits, reflects, influences, limits or fully securitises the SYA participant's potential or actual net liability on any of his insurance contracts;⁶⁹⁸ (4) the terms of an insurance contract sold at Lloyd's are exhaustive or definitive as to how that contract is required by self-regulators-at-Lloyd's to be performed by SYA participants;⁶⁹⁹ (5) “three-year accounting” is principally about accounting.⁷⁰⁰ It has very little to do with accounting (a managing agency is required to generate annual SYA-participants' accounts); it is a rule about multi-YOR closing.⁷⁰¹

terminological infelicities

“agent” or “agency”? “underwriting agent”

- 3.83** “Underwriting agent” (not a term or function unique to the Lloyd's enterprise⁷⁰²) has rightly been called “a generic term the use of which invites confusion”,⁷⁰³ certainly as used statutorily,⁷⁰⁴

⁶⁹⁴ See for example Corporation RA fye December 31, 2000, p.30; Corporation RA fye December 31, 1999, p.32.

⁶⁹⁵ See for example Corporation RA fye December 31, 2000, p.30; Corporation RA fye December 31, 1999, p.32.

⁶⁹⁶ See *Astor's Law of Lloyd's*, 2nd Ed.

⁶⁹⁷ See *Astor's Law of Lloyd's*, 2nd Ed.

⁶⁹⁸ See *Astor's Law of Lloyd's*, 2nd Ed.

⁶⁹⁹ See *Astor's Law of Lloyd's*, 2nd Ed.

⁷⁰⁰ See p.203.

⁷⁰¹ See for example Byelaw 18 of 1994, §2 (“Closing of years of account”):-

(1) Every year of account of a syndicate shall be kept open for not less than three years from the beginning of that year of account (or, if applicable, for not less than the minimum period prescribed by the Council under sub-paragraph (2)). (2) The Council may from time to time, in relation to any specified syndicate or class or description of syndicates, prescribe a period longer than three years as the minimum period for which each year of account of that syndicate or of any syndicate falling within that class or description shall be kept open. (3) The Council may require that the content or form of any contract of reinsurance to close be such as the Council may prescribe; and any requirements so made may apply generally or in relation to any particular case or class of cases.

⁷⁰² For use of “underwriting agent” elsewhere, where the phrase has its own particular meaning, see for example *Yona International Ltd. v La Réunion Française Société Anonyme d'Assurances* [1996] 2 Lloyd's Rep. 84 (Moore-Bick J); *Group Josi Re v Walbrook Insurance Co. Ltd.* [1996] 1 WLR 1152, 1157, 1162 (Staughton LJ); *Kingscroft Insurance Co. Ltd. v H.S. Weavers (Underwriting) Agencies Ltd.* [1993] 1 Lloyd's Rep. 187 (Harman J); *AA Mutual Insurance Co. Ltd. v Bradstock Blunt & Crawley Ltd.* [1996] LRLR 161, 162 (Hobhouse J); *Home Insurance Co. v M.E. Rutty Underwriting Agency* [1996] LRLR 415 (Mance J); *D R Insurance v Seguros America Banamex* [1993] 1 Lloyd's Rep. 120 (Hamilton QC); *Atlantic Underwriting Agencies Ltd. and David Gale (Underwriting) Ltd. v Compagnia Di Assicurazione Di Milano SpA* [1979] 2 Lloyd's Rep. 240 (Lloyd J).

in the FSA Rulebook,⁷⁰⁵ and in byelaws⁷⁰⁶ and elsewhere in the Rulebook at Lloyd’s.⁷⁰⁷ It gives no hint that there are at least five⁷⁰⁸ types of underwriting agent at Lloyd’s, *viz.*: (1) a members’ agency⁷⁰⁹ (which does no active underwriting); (2) a coordinating members’ agency⁷¹⁰ (where a Member has more than one members’ agency); (3) a managing agency;⁷¹¹ (4) a combined agency⁷¹² (a members’ agency which happens also to be a managing agency); (5) recently, a PRS manager.⁷¹³ Since no natural person is, or apparently can under the Rulebook at Lloyd’s be, an “underwriting agent”,⁷¹⁴ this Edition uses the word “agency” instead of “agent”.

⁷⁰³ *Neill*, §2.11 (p.6). Infelicities include (for example) Financial Services Act 1986, s.42 (“persons permitted by the Council of Lloyd’s to act as underwriting agents at Lloyd’s”); Finance Act 1989, s.38(10) (“authorised Lloyd’s underwriting agent”) and *ibid.*, s.38(12) (which uses Financial Services Act 1986 terminology); Income and Corporation Taxes Act 1988, s.451; Finance (No. 2) Act 1987, Schedule 6, para. 8(1) (“companies permitted by the Council of Lloyd’s to act as underwriting agents at Lloyd’s”). For extreme multiple judicial error, see *Richards v Lloyd’s*, February 3, 1998 (Goodwin CJ; rehearing by 9th Circuit Court of Appeals en banc):-

Lloyd’s is a market Underwriting Agencies, or syndicates, compete for ... insurance business. Each Underwriting Agency is controlled by a Managing Agent who is responsible for the financial status of its agency.

Lloyd’s is not a market. “Underwriting agency” is not synonymous with “syndicate”. An underwriting agency is not controlled by a managing agent. “[W]ho is responsible [etc.]” is incomprehensible. Members’ and managing agencies have even been confused, in US litigation, with Lloyd’s agents: see for example *In the Matter of The Society Incorporated by Lloyd’s Act 1871*, Cause No. 96-0050 CD, State of Indiana, Office of the Secretary of State, Securities Division, Administrative Complaint (August 26, 1996), §13, etc.

⁷⁰⁴ See for example Lloyd’s Act 1982, s.2(1), defining “underwriting agent” as “a *person* permitted by the Council to act as an underwriting agent at Lloyd’s” (italics added). This was infelicitous — members’ and managing agencies can be partnerships as well as companies — even in 1981. See similarly *ibid.*, Lloyd’s Act 1982, s.8(2):-

An underwriting member (not being *himself* an underwriting agent) shall underwrite contracts of insurance at Lloyd’s only through an underwriting agent.

Italics added. Section 8(2) is both misleading (erroneously suggesting that underwriting agents as defined can be natural persons, and that all underwriting agents are managing agencies: the sub-section applies only to managing agencies, which can be only partnerships or companies) and inconsistent with the *ibid.*, s.2(1) definition (which embraces both members’ and managing agencies). PCW Names’ representatives argued (see for example PCW Names Association’s March 22, 1999 letter to PCW Names, p.2) that the Council had no power to appoint AUA 9 because the PCW Names had no underwriting business because that business had been outward-RTCd to SYA 9001. This is multiple error. Lloyd’s Act 1982, s.8(2) is manifestly not the only circumstance in which “Lloyd’s” may and does require a Member to have an agent; nor was the proposed appointment of AUA 9 in any way connected with *ibid.*, s.8(2).

⁷⁰⁵ FSA Rulebook Glossary: “underwriting agent”: “a firm permitted by the Council to act as an underwriting agent at Lloyd’s”.

⁷⁰⁶ See for example Byelaw 1 of 1984, §3(a), first (i)-(iii), and the less misleading (prolix) definition in Byelaw 4 of 1984, §1(a) (“a managing agent or a members’ agent or a managing agent which is also a members’ agent or, if the context requires, a *body* applying to be permitted by the [Council] to act as a managing agent or members’ agent or both a managing agent and a members’ agent”); italics added.

⁷⁰⁷ See for example PTD (general) 1999, Sch. 1, §1, definition of “Managing Agent”, *viz.*, “an underwriting agent [etc.]”.

⁷⁰⁸ In Byelaw 30 of 1996, §5(1)(a)(ii), the use of “underwriting agent” near “members’ agent or managing agent” might suggest that in that context there is yet another type.

⁷⁰⁹ See *Astor’s Law of Lloyd’s*, 2nd Ed.

⁷¹⁰ See *Astor’s Law of Lloyd’s*, 2nd Ed. To add to the confusion, the Rulebook at Lloyd’s uses the phrase “co-ordinating agent”, omitting the “members”.

⁷¹¹ See *Astor’s Law of Lloyd’s*, 2nd Ed.

⁷¹² See *Astor’s Law of Lloyd’s*, 2nd Ed.

⁷¹³ See Byelaw 9 of 1999, §2(1).

⁷¹⁴ While “agent” ordinarily conveys that agency duties attach not only to a body but also to its employees, the phrases “underwriting agent”, “members’ agent” and “managing agent”, as used in the Rulebook at Lloyd’s, always refer to either companies or partnerships, never to natural persons (who are self-regulated individually). See for example Byelaw 4 of 1984, §4(a)(i) (“no person may act as a managing agent or a members’ agent unless it is a *body* registered as such under this byelaw”); *ibid.*, §5 (“Any *body* wishing to act as an underwriting agent...”); italics added. For Rulebook at Lloyd’s provisions distinguishing between “underwriting agents” and their personnel, see for example Byelaw 18 of 1983, §4; Byelaw 4 of 1984, §8(c). For judicial error, see for example *Deeny v Gooda Walker Ltd.* [1996] LRLR 109, 110 (Peter Gibson LJ: “Some Names are themselves underwriting agents ...”).

“annual venture” and other things about a syndicate

- 3.84** The notions⁷¹⁵ are misconceived that: (1) a syndicate is an “annual venture”.⁷¹⁶ Participation in a SYA lasts for as many YORs as happen to pass — at least three YORs and possibly many more — before its individual participants collectively are permitted or are able to buy outward-RTC, which transaction has the effect, as at its effective date, of finalising for all relevant purposes those participants’ individual collectivised accounts. Further, a Member is not permitted, annually or otherwise, to amend deployments of PIL already made on SYAs: he is not permitted to participate in a SYA for one calendar year and then re-deploy the same PIL on some other SYA in the following calendar year. Such deployments as he chooses to make on SYAs budding in a particular new UY are cumulatively additional to, not instead of, deployments he has already made on SYAs that budded in previous UYs; (2) a syndicate lasts “from year to year”, or is “re-constituted annually”. Such phrases are meaningless.⁷¹⁷

“contract of long-term insurance”

- 3.85** UK external insurance regulation uses “contract of long-term insurance”⁷¹⁸ to designate (among other things) short-term life products,⁷¹⁹ while misleadingly categorising extra-long-tail⁷²⁰ CGL products as “general insurance contracts”.⁷²¹

“individual”

- 3.86** Self-regulators at Lloyd’s intentionally⁷²² use the tautologous “individual Member”⁷²³ in an attempt to describe a Member who is a natural rather than a legal person, and similarly speak of “individual registration”⁷²⁴ and “registered individual”.⁷²⁵ How is one to speak of an individual natural or corporate Member? Compounding confusion, self-regulators-at-Lloyd’s use a third

⁷¹⁵ Emanating partly perhaps from the misleading Rulebook at Lloyd’s phrase “syndicate for a year of account”: see for example SUA 1 / SCA 1, §5(ca).

⁷¹⁶ See for example *Improving the Annual Venture* — or similar should be assumed to be erroneous.

⁷¹⁷ See p.704.

⁷¹⁸ To which specific external insurance regulation applies: see for example in the insolvency context Financial Services and Markets Act 2000, s.376 (“Continuation of contracts of long-term insurance where insurer in liquidation”); Insurers (Winding Up) Rules 2001 (2001 SI 3635), §5 (“Separation of long-term and other business in winding up”), §9 (“Attribution of liabilities to company’s long-term business”), §10 (“Attribution of assets to company’s long-term business”); Financial Services and Markets Act 2000 (Treatment of Assets of Insurers on Winding Up) Regulations 2001 (2001 SI 2968), §3(1)(a), etc.

⁷¹⁹ Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (2001 SI 544), §3(1) and *ibid.*, Sch. 1, Part II, §1; FSA Rulebook Glossary, definition of “long-term insurance contract”, §(a) (“life and annuity”) (and see similarly its repealed predecessor, Insurance Companies Act 1982, s.1(1) and *ibid.*, Sch. 1, Number I (“Life and annuity”)).

⁷²⁰ See for example *Toomey v Eagle Star Insurance Co. Ltd.* [1994] 1 Lloyd’s Rep. 516, 520 (Hobhouse LJ).

⁷²¹ Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (2001 SI 544), §3(1) and *ibid.*, Sch. 1, Part I, §13; FSA Rulebook Glossary, definition of “general insurance contract”, §(m) (“general liability”) (and see similarly its repealed predecessor, Insurance Companies Act 1982, Sch. 2, Part I (“General business — Classes”), item 13, general liability business).

⁷²² See for example Byelaw 4 of 1984, §29 (“Every partner ... who is a natural person ...”); Byelaw 17 of 1997, §2(8) (“ongoing natural syndicate”); Mkt. Bn. Y1000, October 30, 1998 (“1998 year end”), attachment (“1998 year end arrangements”), §1.0 (“Placing 1999 Risks”) (“natural syndicates”).

⁷²³ See for example Byelaw 17 of 1993, Schedule, §1, definition of “individual member”, *viz.*, “a member of the Society who is an individual” (and Byelaw 1 of 1983, §1(bai) — all Members, natural and corporate, are individuals. Illogically and inconsistently, SMA 2, SUA 1 and SCA 1 use the word “general” to categorise the forms of standard-form agency agreement appropriate to natural Members. And see recently for example *Captives Guidance Notes 1999*, Attachment 4, Section 2, §2(e). And see Lloyd’s Act 1982, ss.11(3), (5), 12(1)(e), (f), etc. The error is not confined to the Lloyd’s enterprise: see for example Policyholders Protection Act 1975, s.32(2B) as added by Policyholders Protection Act 1997, s.17(1).

⁷²⁴ See for example Individual Registration Byelaw (No. 3 of 1998).

⁷²⁵ See for example Individual Registration Byelaw (No. 3 of 1998), §1(3).

term, “personal”,⁷²⁶ to describe a natural Member. External insurance regulation sometimes uses⁷²⁷ “individual” correctly.

“joint asset”

- 3.87** The phrase “joint asset”, embedded in the title of two claims securitisation trust funds — Lloyd’s American Surplus or Excess Lines Insurance Joint Asset Trust Deed and Lloyd’s American Credit For Reinsurance Joint Asset Trust Deed and in ancillary — is grossly infelicitous in connection with anything at Lloyd’s, including statutorily⁷²⁸ and self-regulatorily.⁷²⁹ Joint liability does not exist at Lloyd’s. “Common use” is to be preferred.

“Lloyd’s”

- 3.88** The most superficial inquiry in Lloyd’s Acts 1871-1982 readily discloses that the word “Lloyd’s” has a special meaning. Inapposite to refer to any component of the Lloyd’s enterprise other than the Corporation,⁷³⁰ the word “Lloyd’s” is endemically misused, not least by self-regulators-at-Lloyd’s,⁷³¹ lawyers,⁷³² and US judges, misdescribing the Corporation, sometimes to considerable confusion,⁷³³ as (for example):-

(1) a contractual⁷³⁴ insurer⁷³⁵ and thus, by implication, SYA participants. Insurance products are sold at Lloyd’s only by individual SYA participants.⁷³⁶ One or more SYA participants are not

⁷²⁶ *Security at Lloyd’s 2000*, unnumbered page headed “Readily available resources” (“In case the resources in the premiums trust funds prove insufficient to meet obligations to policyholders, every member, both corporate and personal ...”).

⁷²⁷ See for example Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 1993 (1993 SI 3245), §4(3)(c) (“the method by which the premium income limit for individual members of Lloyd’s syndicates is calculated”). Note the erroneous use of “syndicates” and the conceptually flawed use of “member”. A SYA has participants. A syndicate does not have members.

⁷²⁸ In relation only to insurance contracts, see Lloyd’s Act 1982, s.8(1).

⁷²⁹ In relation to Rulebook at Lloyd’s requirements that SYA participants and Members make severalised contributions to common-use funds, see the relevant provisions.

⁷³⁰ See p.137.

⁷³¹ See for example recently Mkt. Bn. Y2131, September 17, 1999 (“Hong Kong”):-

Historically, Lloyd’s [SYA participants] has been exempted from most of the regulatory requirements applicable to an authorised insurer in Hong Kong. ... For the past two years Lloyd’s [self-regulators-at-Lloyd’s] has been in discussion with the IA with the aim of ensuring that the revised trading arrangements continue to take account of Lloyd’s [the Lloyd’s enterprise’s] unique structure and mode of operation.

And see for example *Lloyd’s: A Sketch History* (Lloyd’s):-

Lloyd’s ... is an organisation of many different yet complementary facets: a corporation; a society of underwriters; an international insurance market; publishers; the world centre of marine intelligence; and a major City landowner. Each and all of these descriptions apply to Lloyd’s.

⁷³² See for example *S&M*, §52(a) (p.19; “Lloyd’s” to describe self-regulators-at-Lloyd’s); *ibid.*, §55 (p.20; “Lloyd’s” to describe the Lloyd’s enterprise); *ibid.*, §57 (p.21; “Lloyd’s” to describe Members); *ibid.*, §58 (p.21; “Lloyd’s” to describe the Corporation). And see *Lloyd’s v Clementson* {1b} [1995] LRLR 307, 332 (Hoffmann LJ):-

For some purposes it presents itself as a single institution seeking to preserve or increase its market share against outsiders and for other purposes it acts as an association of individual insurers, each competing with each other as well as with outside insurers.

⁷³³ See for example US jurisprudence on federal diversity jurisdiction over “syndicates”.

⁷³⁴ On the Corporation’s liability to discharge insurance contracts made by SYA participants, see p.137 *et seq.*

⁷³⁵ Mutualisation of SYA participants’ liabilities is not insurance; nor does mutualisation (the affair of Members) necessarily have anything to do with the Corporation (a separate person which makes no contributions to the Central Fund). Examples of error include: (1) legislation: First Non-Life Directive 73/239/EEC (as amended), Art.16(5), second § (“The details, together with the relevant calculations shall be sent to the authorities of the countries where Lloyd’s is established”) and Directive 91/674/EEC, Annex, B, §11 (“Lloyd’s life-assurance business”); (2) English litigation: *Eide UK Ltd. v Lowndes Lambert Group Ltd.* [1998] 3 WLR 643, 646 (Phillips LJ; “[T]he brokers procured two hull and machinery policies, one with Lloyd’s ...”); *Container Transport International Inc. v Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1984] 1 Lloyd’s Rep. 476, 506 (Kerr LJ; “... insurers of the calibre of Lloyd’s”; “... reinsurance of Lloyd’s”); *ibid.*, 519, 521-2 (Parker LJ); *Barratt Bros. (Taxis) v Davies* [1966] 2 Lloyd’s Rep. 1, 3 (Denning MR; “Under the policy Lloyd’s agreed ...”); *The Merak; T. B. & S. Batchelor & Co., Ltd. (Owners of Cargo on The Merak) v Owners of S. S. Merak* [1964] 2 Lloyd’s Rep. 283, 289 (Scarman J; “On Dec. 27, 1962, solicitors for the owners wrote to Lloyd’s repudiating liability ...”; they did not). For compound terminological infelicity, see *Bragg v Oceanus Mutual Underwriting Association*

synonymous with Lloyd's. SYA participants' individual annual accounts — in agglomerated form often misleadingly called "Lloyd's global accounts"⁷³⁷ — are not, and have virtually nothing to do with, the Corporation's annual accounts.⁷³⁸ To the extent that the Corporation produces policies embellished with its personal crest, it does so as each SYA participant's agent, not as a principal.⁷³⁹ Nor is the Corporation a trading vehicle for Members, nor are Members its trading organs or agents; nor generally⁷⁴⁰ is the word "Lloyd's" a business name for SYA participants. The Corporation is never ordinarily subrogated to an assured-at-Lloyd's.⁷⁴¹ Whether the Corpo-

(*Bermuda*) Ltd. [1982] 2 Lloyd's Rep. 132, 134 (Kerr LJ; 'The two plaintiffs are a representative Lloyd's Underwriter and a representative Institute of London Insurance company. For convenience and brevity I will refer to them collectively as "Lloyd's"; and see *ibid.*, 135 ("he had previously placed the C.T.I. cover with Lloyd's, in particular since Lloyd's ... had themselves made this allegation against Heath ...") — all the judge's uses of "Lloyd's" are erroneous). For compound error, see *Bell v Tinnmouth*, 43 D.L.R. 4th 468, 496 (Carrothers JA; "We have before us an application for an order quashing an appeal, which application to quash has been made by the respondent Tinnmouth, representing members lifted in an insurance policy of the Institute of London Underwriters (whom, for convenience, I shall refer to collectively as "Lloyds")"). For relative accuracy, see *Foster v Kentucky Hous. Corp.*, 850 F. Supp. 558, 559, n.1 etc. ("The plaintiff, David G. Foster, is a citizen of the United Kingdom and an underwriter at Lloyd's, London which issued the policy in question. For clarity purposes, the plaintiff hereinafter will be referred to as Lloyd's. ... In this declaratory judgment action, the plaintiff seeks a determination that the policy issued by Lloyd's ..."); *Alexander & Alexander Servs. v Lloyd's Syndicate* 317, 902 F.2d 165 (2nd Cir. 1990); (4) self-regulators-at-Lloyd's: self-regulators-at-Lloyd's use the word Lloyd's extensively to refer to SYA participants, self-regulators-at-Lloyd's and the Lloyd's enterprise. See also the multiple confusion at, for example, *Managing Agency & Syndicate Guidance* 1998, App. 2, §3.2 (p.85; "Lloyd's trading status as an accredited reinsurer"; "At present Lloyd's is an accredited reinsurer in all states except Michigan, Arizona, Kansas and Colorado. Lloyd's is working to restore accredited status in these states in the near future. Lloyd's completes filings centrally on behalf of all syndicates in each of the 50 states in order to maintain Lloyd's trading status as an accredited reinsurer in such states, enabling cedants to take credit for reinsurance placed at Lloyd's. Lloyd's status is based largely upon the existence of the Lloyd's US-situs credit for reinsurance trust funds and upon the filing of central information relating to Lloyd's global solvency"); (5) colloquial: "Lloyd's results" to refer to the results not of the Corporation but of SYA stamps; "Lloyd's premium income" (at, for example, <http://www.lloyds.com.businfo/keyfacts/wwwpresence/body.htm> (July 13, 1998): the Corporation does not have any premium income; (6) press: see for example multiple error at *The Observer*, June 1, 1997, *Business*, p.3, in the context of the Corporation suing Richard Rogers Partnership and others in relation to the rusting pipes on Lloyd's 1986 Building ("Ironically, if Lloyd's is successful it is likely, as an insurer, to have to pay some of the engineers' and constructors' claims"); (7) R&R: RRC 14, §20.4.1 ("... to enable Lloyd's to continue to underwrite business in Illinois"); (8) other: see for example *NYID Report* 1995, May 11, 1995 cover letter, p.1 ('Whenever the term "Lloyd's" appears herein without qualification, it should be understood to indicate the members of Lloyd's underwriting community').

See p.180.

See *Astor's Law of Lloyd's*, 2nd Ed.

Corporation RA 1996, p.30 (Notes to the financial statements, note 2A): "The [Corporation's] financial statements exclude all insurance related activities arising from members underwriting as Names at Lloyd's." Concerning the Corporation's latest RA (fye December 31, 1999), neither the cover nor the p.1 table of contents of the booklet in which they were published ("Global results 1999") indicated their presence (at *ibid.*, p.33 *et seq.*).

Rozanes v Bowen (1928) 32 Lloyd's List Law Reports 98, 101 (Scrutton LJ): "[I]t cannot be too clearly understood by those who do not know anything about it that Lloyd's does not insure; Lloyd's as such never insures; the corporation never insures. ... Lloyd's insures nobody and takes no liability." The statement is not definitive or exhaustive of the Corporation's role in the event of the Lloyd's enterprise ceases to do business as usual: see relevant parts of this Chapter. See similarly *Industrial Guarantee Corporation, Ltd. v Lloyd's* (1924) 19 Lloyd's List Law Reports 78, 83 (Bailhache J), commenting on a promotional pamphlet put out by Lloyd's: "There is a statement that the premium income of Lloyd's is now £30,000,000 a year. As a matter of fact, Lloyd's have no premium income at all. They have not £30,000,000 or thirty pence of premium income." See similarly *Napier and Ettrick v R. F. Kershaw Ltd.* [1999] 1 WLR 756, 759 (Lord Steyn); *Scott v Tuff-Kote (Australia) Pty. Ltd.* [1976] 2 Lloyd's Rep. 103, 107 (Australia, NSW Supreme Court, Equity Div., Needham J; "Lloyd's does not carry on the business of insurance"); *Eagle Star Insurance Company Ltd. v Spratt* [1971] 2 Lloyd's Rep. 116, 124 (Lord Denning MR); *Travelers Indemnity Co. v Booker*, 657 F Supp. 280, 282 (D.DC 1987: "Contrary to the popular conception, Lloyd's is not a monolithic institution, nor does it operate in the same manner as a corporation in this country"); *Cassidy v Forum Insurance Co.* 561 N.E. 2d 1167, 1168 (Ill. App. 1990: "The Lloyd's corporation does not operate in the same manner as a United States corporation. Lloyd's provides a physical site for its members to conduct the buying and selling of insurance risks. None of these risks falls upon the corporation but upon its individual members"). And see for example Lloyd's Act 1911, s.4 ("the carrying on by its members ..."); italics added.

See the errors at for example *Foster v Kentucky Hous. Corp.* 850 F. Supp. 558, 559, n.1 etc. ("The plaintiff, David G. Foster, is a citizen of the United Kingdom and an underwriter at Lloyd's, London which issued the policy in question. For clarity purposes, the plaintiff hereinafter will be referred to as Lloyd's"). And see *Industrial Waxes, Inc v Brown* [1958] 2 Lloyd's Rep. 626, 627 (2d. Cir. 1958; "These shipments are covered by marine insurance issued by a group of English underwriters, of which the defendant is a member, doing business under the name of Lloyd's").

ration happens to be personally liable⁷⁴² on an insurance contract made by a SYA participant is an unresolved question;

(2) a society or association.⁷⁴³ Being one person, Lloyd’s cannot be a society or an association,⁷⁴⁴ including a voluntary or unincorporated⁷⁴⁵ association. The familiar self-regulatory and external insurance regulatory term “Society of Lloyd’s” is multiply misconceived;⁷⁴⁶

(3) Members collectively,⁷⁴⁷ the correct term for whom is “members of Lloyd’s collectively” (or similar), not “Lloyd’s”, “the Society of Lloyd’s”⁷⁴⁸ or “the Society”. Members collectively are not synonymous with the Corporation;

⁷⁴¹ See the defective title in *Lloyds of London, as subrogee of William G. Cirincione and the Yacht “Tropic Lightning” v Cozy Cove Yacht Sales, Inc., Blackfin Yacht Corp.*, 48 F.3d 535 (11th Cir. 1995).

⁷⁴² See p.137 *et seq.*

⁷⁴³ Examples of error include: (1) legislation: see for example Insurance Premium Tax Regulations 1994 (1994 SI 1774), §2(1) (“In these Regulations ... “Lloyd’s” means the society incorporated by section 3 of Lloyd’s Act 1871”); First Non-Life Directive 73/239/EEC, §8.1(a) (as substituted by Third Non-Life Directive, 92/49, Art. 6); First Life Directive 79/267/EEC, §8.1(a) (as substituted by Third Life Directive 92/96/EEC, §5) and Insurance Accounts Directive, nineteenth and twenty-second recitals and *ibid.*, §4 (“the association of underwriters known as Lloyd’s”). The terminological error is compounded in *ibid.*, Annex, A (“For the purposes of this Directive, both Lloyd’s and Lloyd’s syndicates shall be deemed to be insurance undertakings” — neither the Corporation nor any syndicate sells insurance); (2) English litigation: *Ashmore v Lloyd’s* [1992] 1 WLR 446, 449 (Lord Templeman; “Lloyd’s is a society of individual underwriters incorporated by statute and authorised by its constitution to exercise supervisory, regulatory and disciplinary power over its members”; the Corporation is not a society and is not expressly authorised by its constitution to exercise any power over anyone); *Deeny v Gooda Walker (in liquidation)* (No. 2) {5b} [1996] LRLR 109, 110 (Peter Gibson LJ; “Lloyd’s is a society of individual underwriting members”); *R v Lloyd’s ex parte Briggs* QB Div. Ct. unreported, May 22, 1992, transcript, p.11 (Laws J’s persistent use of “Society” to describe the Corporation; quoted at *ibid.*, [1993] 1 Lloyd’s Rep. 176, 185 (Leggatt LJ)). And see *Lloyd’s v Clementson* {2} [1997] LRLR 175, 246 (Cresswell J); *Lloyd’s v Clementson* {1b} [1995] LRLR 307, 322 (Bingham MR; “Mr. Mason was subjecting himself to the regulatory jurisdiction of a body of which he was becoming a member and consisting of his fellow-members”); *ibid.*, 323 (Bingham MR; “Lloyd’s ... is a Society of individual underwriting Names, grouped in syndicates”; — it is neither); *ibid.*, 330 (Steyn LJ) (“Lloyd’s is an association of members”); (3) other: *Scott v Tuff-Kote (Australia) Pty. Ltd.* [1976] 2 Lloyd’s Rep. 103, 107 (Australia; NSW Supreme Court; Equity Div., Needham J; “It will be apparent ... that Lloyd’s does not carry on the business of insurance. It is a Society comprised of persons some of whom carry on the business of insurance ...”); *Fisher WP*, §6.02 (p.33); *Treasury Sel. Comm. 1*, §5 (“Lloyd’s was first incorporated as a Society by the Lloyd’s Act 1871”); *NYID Report 1995*, p.2-3 (“Lloyd’s ... comprises a society of underwriters incorporated in 1871 ...”). And see the multiple error at H. Commineilis, *Excess & Surplus Lines Insurance: Slow Growth and Sharpening Competition*, in *Journal of Reinsurance*, Summer 1998, p.51, 57 (“The 310-year-old insurance society Lloyd’s ...”).

⁷⁴⁴ It follows that Lloyd’s Act 1871, twelfth recital is infelicitous (“whereas it is expedient that provision be made for the incorporation, from time to time, by agreement, with the Society, of *other societies* ...”); italics added. “Company” and the popular legal term “company in general meeting” are similarly inherently contradictory.

⁷⁴⁵ See for example *Graham v. Lloyd’s of London*, 296 S.C. 249 (S.C. Ct. App. 1988). 257: held, such failure was not fatal. *Ibid.*: ‘The complaint designates Lloyd’s as “an insurance company or [***13] business enterprise engaged in the issuance of policies of insurance.” The Insurance Law defines an “insurance company” as including “any ... association, ... society, ... individual, or aggregation of individuals engaging ... as principals in any kind of insurance or surety business. ...”. Section 38-1-20(22), Code of Laws of South Carolina, 1976, as amended (former Section 38-1-20). Under the statutory definition, the underwriters at Lloyd’s are an insurance company. ... Applying the rule that pleadings must be construed liberally in favor of the pleader, we hold that Graham’s complaint is sufficient to permit proof that “Lloyd’s” is an unincorporated association organized for the purpose of permitting its members to carry on the insurance business.’ And see the egregious multiple error at *Underwriters at LaConcorde v Airtech Servs.*, 493 So. 2d 428, 430: ‘It is a matter of common knowledge that Lloyd’s of London is not an insurer, nor is it a legal entity. It is an unincorporated association of insurers’.

⁷⁴⁶ See p.184.

⁷⁴⁷ Error includes (for example): (1) UK legislation: presumably, Insurance Companies Act 1982, s.83A (“... if there is failure by Lloyd’s to satisfy an obligation ...”), all the more curious given “members of Lloyd’s” a few words earlier in the same section; Insurance Accounts Directive, Annex, §A; (2) in US litigation: the SEC’s May 1996 amicus brief in the *Richards v Lloyd’s* appeal, p.6-7 (“Lloyd’s ... does not underwrite insurance, but is composed of individual members ...”); *Ell Dee Clothing Co. v Marsh*, 247 N.Y. 392, 397 (“London Lloyds is a voluntary association of merchants, shipowners, underwriters and brokers ...”); *Underwriters at LaConcorde v Airtech Servs.*, 493 So. 2d 428, 430 (“It is a matter of common knowledge that Lloyd’s of London is not an insurer, nor is it a legal entity. It is an unincorporated association of insurers”); *Luce v Lloyd’s Of London*, 868 F. Supp. 625, 625 (“Lloyd’s is comprised of individuals ...”); *Save Mart Supermarkets v Underwriters at Lloyd’s London*, 843 F. Supp. 597, 600, n.2, etc.

(4) a self-regulator.⁷⁴⁹ The use in litigation of “Lloyd’s” *simpliciter* as a synonym for members of the Old Committee, Committee or Council⁷⁵⁰ — erroneous in all cases — has caused considerable confusion.⁷⁵¹ Lloyd’s Acts 1871-1982 confer on Lloyd’s no express power⁷⁵² to promulgate byelaws, regulations or directions or do anything else of a self-regulatory nature. Query whether Corporation employees are even permissible⁷⁵³ delegates of Council members. In describing the

748 See p.184.

749 As in, for example, “Lloyd’s is committed to helping Names” (*SOD*, p.5) or “Lloyd’s has just passed a byelaw ...”. Other examples of error include: (1) legislation: see for example Lloyd’s Act 1982, recital §(6) (“It is expedient in order to enable the Society to regulate the management of its affairs ...”, corrected later in the same recital (“(a) there should be established a Council of Lloyd’s to have control over the management and regulation of the affairs of the Society”)); (2) English judicial error: *Napier and Ettrick v R. F. Kershaw Ltd.* [1999] 1 WLR 756, 759 (Lord Steyn: “The function of Lloyd’s is to manage and regulate the Lloyd’s insurance market”; it is not); *Lloyd’s v Leighs* [1997] CLC 1398, 1399 (CA: “The society has ... purported to procure ...”); *Ashmore v Lloyd’s* [1992] 1 WLR 446, 449 (Lord Templeman: “Lloyd’s is a society authorised by its constitution to exercise supervisory, regulatory and disciplinary powers over its members.”; it is not); *Ashmore v Lloyd’s* unreported, Phillips J, quoted at *Ashmore v Lloyd’s (No. 2)* [1992] 2 Lloyd’s Rep. 620, 632 (Gatehouse J (“In my judgment, the public undoubtedly has an interest in the proper exercise of the statutory powers and duties conferred on Lloyd’s ...”)); *Ashmore v Lloyd’s (No. 2)* [1992] 2 Lloyd’s Rep. 620, 632 (Gatehouse J: “Lloyd’s is authorized by its constitution to exercise supervisory, regulatory and disciplinary powers over its members. ... It is a most important function of the Corporation to regulate the Lloyd’s insurance market”; it is not, and the Corporation has no such function); *Lloyd’s v Clementson* {1b} [1995] LRLR 307, 331 (Steyn LJ, in the self-regulatory context: “Lloyd’s like any other statutory body, must act within the law”); *ibid.*, 332 (Hoffmann LJ); *ibid.* {2} [1997] LRLR 175, 180 (Cresswell J: “It is of fundamental importance to note that this case is ... not a general investigation into alleged regulatory failure on the part of Lloyd’s”); *R v Lloyd’s ex parte Briggs* [1993] 1 Lloyd’s Rep. 176, 185 (QB Div. Ct., Leggatt LJ: Lloyd’s “powers are derived from a private Act which does not extend to any persons in the insurance business other than those who wish to operate in the section of the market governed by Lloyd’s and who, in order to do so, have to commit themselves by entering into the uniform contract prescribed by Lloyd’s”; the Corporation does not have relevant powers, or govern, or prescribe in the way stated). An inkling of the correct distinction between the Corporation and the Council is at *Lloyd’s v Clementson* {2} [1997] LRLR 175, 192 (Cresswell J). And see *Deeny v Gooda Walker* {7} [1995] 1 WLR 1206, 1209 (Phillips J)); (3) US judicial error: see for example *Richards v Lloyd’s*, 135 F.3d 1289 (“Pursuant to the Lloyd’s Act of 1871-1982, Lloyd’s oversees and regulates the competition for underwriting business in the Lloyd’s market”; it does not); *Shell v R. W. Sturge Ltd.* 850 F. Supp. 620, 626 (“The Corporation of Lloyd’s was created by an Act of Parliament to regulate Lloyd’s insurance market” — it was not); *Haynsworth and Leslie v Lloyd’s* 121 F.3d 956, 958 (Jerry E. Smith, Circuit Judge: “Lloyd’s of London is simply a trademark referring to a market for insurance, and the Corporation of Lloyd’s the entity that governs that market”; the Corporation is not); *Richards v Lloyd’s of London etc.* October 5, 1994 Complaint, p.10; State of Ohio, Department of Commerce, Division of Securities, Findings of fact, conclusions of law, and recommendations of the hearing officer, Case no. 94-203, March 7, 1996, p.2 (“The corporation ... regulates members”); *People of the State of California v Lloyd’s [etc.]*, February 21, 19967 complaint, §1 (p.1); *In the Matter of Lloyd’s of London [etc.]*, Pennsylvania Securities Commission, Administrative Proceeding Docket No. 9412-10, Summary Order to Cease and Desist. And see May 1, 1996 letter from Fried, Frank, Harris, Shriver & Jacobson’s counsel for Lloyd’s to State of Tennessee then Deputy Attorney General, p.2 (“Lloyd’s ... disputes ... that any aspect of a Name’s involvement in the Lloyd’s market constitutes a “security”); (4) US lawyers’ error: *Lloyd’s v Feigin*, December 28, 1995 opening brief of appellant (Lloyd’s), p. 4 (“The Society of Lloyd’s is not an insurance company. It is a regulatory body established under English Law (the Lloyd’s Acts 1871-1982) to govern an insurance market ... The Corporation of Lloyd’s is the administrative arm of the Society; it owns the building in which the market is located and provides various services under the direction of the Society and its elected governing body, the Council of Lloyd’s”); *Feigin v Lloyd’s*, Civil Action No. 96-Z-98, Defendants’ Memorandum of law in support of motion to dissolve preliminary injunction, April 10, 1996, p.1 (“The Corporation of Lloyd’s (referred to below as “Lloyd’s”) exercises regulatory supervision of what is known as the Lloyd’s insurance market ...”); (5) the Rulebook at Lloyd’s: see recently for example Mkt. Bn. Y1017, November 18, 1998 (“Captive syndicates at Lloyd’s”), p.4 (“Lloyd’s has a statutory power to regulate which is derived from the Lloyd’s Act 1982”); there is no such power. And see PTD (general) 1999, recital (C) (“... in consideration of Lloyd’s requiring that an appropriate Premiums Trust Deed ... shall be or shall have been executed ...”; the Corporation has no power to so require; (6) other: see for example *Fisher WP*, §2.02 (“The exemptions from [outside] control which are accorded to Members of Lloyd’s are dependent on the proper exercise by the Corporation ... of its responsibility to regulate the Market”); *Walker CR*, §1.12(b) (“Lloyd’s regulatory arm”); *ibid.*, §1.12(c) and (d) (“Lloyd’s as regulator”); *Kent RC*, §2.14 (p.12).

750 Lloyd’s Act 1982, s.6(1) (italics added): “The *Council* shall have the management and superintendence of the affairs of the Society ... and it may lawfully exercise all the powers of the Society.”

Indeed, the Lloyd’s Act 1982, s.3 Council was created more than a century after the Lloyd’s Act 1871, s.3 Corporation.

751 See for example *Ashmore v Lloyd’s (No. 2)* [1992] 2 Lloyd’s Rep. 620 (Gatehouse J).

752 On a related point, see *Ashmore v Lloyd’s (No. 2)* [1992] 2 Lloyd’s Rep. 620, 632 (Gatehouse J): ‘The first difficulty that the plaintiffs have to face is that the Statute [Lloyd’s Act 1911, s.4] does not impose any express duty upon Lloyd’s: it speak only of “objects”.’

Lloyd’s enterprise’s self-regulatory organs, one should never say “Lloyd’s” — Lloyd’s Act 1871-1982 confer no self-regulatory powers whatever on the Corporation — but rather “the Council of Lloyd’s” or, taking into account the Lloyd’s Regulatory Board and their respective delegates and actors-by, “self-regulators-at-Lloyd’s”. The Council does delegate and act by, but it alone has primary statutory⁷⁵⁴ self-regulatory authority over all components of the Lloyd’s enterprise;

(5) an insurance market.⁷⁵⁵ Lloyd’s is not an insurance or any other sort of market. Though provided, hosted, self-regulated and administered by self-regulators-at-Lloyd’s, the unincorporated, incorporeal Market is not synonymous with the Corporation. “Market” or “Lloyd’s market” are bizarrely used as erroneous shorthand for SYA participants’ several insurance businesses;

(6) other things such as a building,⁷⁵⁶ a place,⁷⁵⁷ the Institute of London Underwriters,⁷⁵⁸ a consortium of investors,⁷⁵⁹ an imaginary group of companies,⁷⁶⁰ a hermaphrodite,⁷⁶¹ and syndicate or a collection of syndicates.⁷⁶²

⁷⁵³ The Corporation is not on the Lloyd’s Act 1982, s.6 apparent lists of permitted Council delegates, yet the Council appears to delegate relevant functions to it.

⁷⁵⁴ See generally Lloyd’s Act 1982, s.6.

⁷⁵⁵ Examples of error include: (1) legislation: Lloyd’s Act 1871, Schedule, §2; Lloyd’s Act 1982, s.2(1) (the definitions there of “Lloyd’s broker” and “underwriting agent”) and *ibid.*, ss.6(1), 6(6)(a)(i), 8(1), (2) and (3), etc.; Financial Services Act 1986, s.42. The phrase “at Lloyd’s” is not used in Insurance Companies Act 1982; (2) in English litigation: *Lloyd’s v Clementson* {2} [1997] LRLR 175, 188 (Cresswell J: “The expression “Lloyd’s” denotes an insurance market”); *Henderson v Merrett Syndicates Ltd.* {1a} [1994] 2 Lloyd’s Rep. 193, 197 (Saville J: “Lloyd’s could not exist as an insurance and reinsurance market ...”); *Moran v Lloyd’s* [1981] 1 Lloyd’s Rep. 423, 424 (Lord Denning MR: “Everyone has heard of Lloyd’s. It is the greatest insurance market in the world”); (3) in US litigation: *Haynsworth and Leslie v Lloyd’s*, 121 F.3d 956 (“Lloyd’s is a 300-year-old market”); *Roby v Lloyd’s* 996 F.2d 1353, 1357 (2nd Cir. 1993) (Meskill CJ: “Lloyd’s is not a company; it is a market”); *Alexander & Alexander Services, Inc. et al. v Certain Underwriters at Lloyd’s etc.*, 136 F.3d 82 (“Lloyd’s operates as a marketplace for the placement of insurance”). And see the multiple error at *Smith v Lloyd’s of London*, 568 F.2d 1115 (5th Cir. 1978) (“Lloyd’s of London is not an insurance company in the general sense. Rather, it is an exchange or a market where various individuals or groups bid on the right to insure a given risk”; it is not and they do not). And see the egregious multiple error at *Bath Iron Works Corp. v Certain Mbr. Cos. Of The Inst. Of London Underwriters*, 870 F. Supp. 3, 4 (“Lloyd’s of London is not an insurance company but, rather, a marketplace for investor-underwriters”). And see *Shell v R.W. Sturge, Ltd.* 55 F.3d 1227 (6th Cir. 1995); (4) self-regulators-at-Lloyd’s: *Introducing the Future at Lloyd’s* (Lloyd’s, January 1997), second text page (“Lloyd’s is a market, not a company”); the then Corporation CEO in National Association of Accountants conference, Paris, April 19, 1985, *The Auditor’s Role at Lloyd’s*, p.1 (“The first general misunderstanding about Lloyds is that we are an insurance company/ We are not. We are a market place ...”); 1998 (undated) verification form, §(1) (“I ... recognise that Lloyd’s is a market ...”); Corporation RA 1996, p.13 (“The recommendations for corporate governance made in the Cadbury and Greenbury reports are formulated in the context of public limited companies whereas Lloyd’s is a market...”); see for example *Graham v. Lloyd’s of London*, 296 S.C. 249 (S.C. Ct. App. 1988), 253-4 (italics added): ‘The Nonsubscribing Underwriters rely primarily on an affidavit of Lloyd’s American general counsel to support their position that Lloyd’s is not a legal entity. ... The Nonsubscribing Underwriters tell us that “Lloyd’s” is not an insurance company, as many believe; that it is not a corporation, an association, or a society. They insist that “Lloyd’s” is a market, a place where individual underwriters do business. The name “Lloyd’s,” they contend, is simply a servicemark used by the underwriters at Lloyd’s, London; it does not designate a juridical entity. Graham, on the other hand, tells us that “Lloyd’s” most certainly is an association or enterprise engaged in the insurance business. He tells us that “Lloyd’s” has members, officers, and a governing committee; that an insurance policy headed “Lloyd’s Policy” and sealed with a “Lloyd’s” seal was issued to Graham through “Lloyd’s Policy Signing Office” by its General Manager; that “Lloyd’s” has an American general counsel in New York; that “Lloyd’s” maintains bank accounts in its name in this country.’; (5) other: *NAIC Review 1998*, p.4 (“Lloyd’s is a market, not an insurer”); *ibid.*, p.7 (“The Lloyd’s market has been a significant participant in the US insurance industry dating back to colonial days. Lloyd’s has enjoyed a 300-year reputation and mystique as a direct writer and also as a reinsurer. Lloyd’s itself is not an insurer. Lloyd’s is a market”); *Treasury Sel. Comm. 1*, §8 (“The underwriter negotiates with the broker on the acceptance of the risk and the level of premium to be paid. Lloyd’s itself is simply the market in which this insurance business takes place”); *PN 2*, Section 1, §1 (“Lloyd’s is an international insurance and reinsurance market”); *NYID Report 1995*, p.2 (“Lloyd’s is an insurance market ...”). And see the compound errors at *Standard & Poor’s Rating of the Lloyd’s Market* (August 1998), p.3 (“Lloyd’s is an insurance market, not a single legal insurance entity”) and *Whitaker’s Almanac 1999*, p.627 (“Lloyd’s of London is an international market ...”).

⁷⁵⁶ *Honey v George Hyman Construction Co.* 63 FRD 443, 446 (DDC 1974; “The Lloyd’s group is not a legal entity; rather, there is a building in London known as Lloyd’s ...”).

⁷⁵⁷ The then Corporation CEO in National Association of Accountants conference, Paris, April 19, 1985, *The Auditor’s Role at Lloyd’s*, p.1 (“Lloyd’s is a place where brokers and underwriters transact insurance business”).

“Lloyd's of London”

- 3.89** The famous phrase “Lloyd's of London” is not the legal name of any association,⁷⁶³ institution, insurance enterprise,⁷⁶⁴ regulator,⁷⁶⁵ or other person or entity — especially including the Corporation — or the trading name of SYA participants,⁷⁶⁶ but a mere trademark, which self-regulators-at-Lloyd's appear to have used to conjure a substantial homogeneous insurance enterprise and have recently apparently discarded.⁷⁶⁷ The phrase (use of which is not confined to insurance⁷⁶⁸) has been used erroneously⁷⁶⁹ to describe one or more components of the Lloyd's enterprise, including the Corporation, Members,⁷⁷⁰ an homogenous entity,⁷⁷¹ or a market.⁷⁷² It has

⁷⁵⁸ See the multiple compound judicial error at *Mopaz Diamonds, Inc. v Institute Of London Underwriters*, 822 F. Supp. 1053, 1054 (‘The defendant, The Institute of London Underwriters (“Lloyds”), is a corporation organized and existing under the laws of the United Kingdom and transacts business in the United States’); *Save-Mor Supermarkets, Inc. v Skelly Detective Serv.*, 268 N.E.2d 666 (1971).

⁷⁵⁹ See for example *K. Bell & Assoc. v Lloyd's Underwriters* (S.D.N.Y. May 26, 1998): “Lloyd's is not an entity, but rather a consortium of individual investors, known as ‘Names,’ that are severally, but not jointly liable for their fraction of risk on an insurance policy.”

⁷⁶⁰ See for example *Levenson v Motor Union Orion Ins. Co.*, 176 So. 2d 125, 127 (“The second case is Franklyn Levenson against Certain Underwriters at Lloyd's London. Hereafter I will refer to those two cases or two defendants as the Lloyd companies.”).

⁷⁶¹ See for example *Sizemore v Lloyd's*, No. 96-1336-II, Chancery Court for Davidson County, Tennessee, June 19, 1996 Memorandum and Order:-

[p.4] The most difficult issue is that of jurisdiction. Each side takes a vastly different view of the role of Lloyd's. According to the defendant, Lloyd's is an institution which provides a market for insurance agents and has no more control over these agents than does a commodities market over its traders. The Commissioner paints a considerably different picture. According to the Commissioner, Lloyd's closely regulates and controls the agents that sell and deal with the insurance in its market [p.14] A prima facie finding is perhaps hampered by the fact that Lloyd's does not fit into the mold of most American business entities. It is androgenous and is something of a cross between a commodities market, a limited partnership, and a corporation.

⁷⁶² See the errors at for example *Pickett v Lloyd's & Peerless Ins. Agency*, 131 N.J. 457, 462; 621 A.2d 445 (‘At the time of the accident, Pickett had a \$30,000 physical-damage policy for his truck with defendant Lloyd's, an under-writing syndicate’).

⁷⁶³ See the error at 93/3/EEC Commission Decision of December 4, 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty IV/32.797 and 32.798 — Lloyd's Underwriting Association and The institute of London Underwriters.: OJ L 4 January 8, 1993, §(3) (“Lloyd's of London is an unincorporated society of private underwriters ...”).

⁷⁶⁴ On amending to add “Lloyd's of London” under the misapprehension it was the correct party, see for example *Colson v Lloyd's of London*, 435 S.W.2d 42, 44 (1968).

⁷⁶⁵ See the error at *Allen v Lloyd's of London*, 94 F.3d 923, 926 (4th Cir. 1996), writ of mandamus denied, 521 U.S. 1102 (1997) (“Lloyd's of London manages an insurance market ...”).

⁷⁶⁶ See the multiple error at *Leeb v Read*, 190 So. 2d 830 (‘The plaintiffs had sought to recover under an insurance policy issued by the defendants, British insurance companies who do business as “Lloyds of London”’).

⁷⁶⁷ Note to the Author from the Corporation, April 20, 1998 (and see similarly *One Lime Street*, March 1997, p.4 (“Global image consolidated”)):-

The previous house style [“Lloyd's of London”] was introduced around ten years ago. Since then, over 47 different Lloyd's insignia have been located world wide, the misuse and inappropriate application of which have resulted in an image which is confusing and disparate. ... Research indicated that a wide audience needs to feel reassured about Lloyd's. Visually, the way in which the market portrayed itself was confusing and fragmented. The research indicated that ‘of London’ was a mixed blessing. ... Following much reflection it was decided to use the single word ‘Lloyd's’ to be more direct and concise.

But a search of the Trade Marks Registry in mid-1998 disclosed pending applications in relation to the words Lloyd's and Lloyd's of London: see for example GB 1282217, GB 2047840, GB 2047843, GB 2021335, EM 193565 and EM 193664.

⁷⁶⁸ For example *Lloyds of London Fashion, Inc.*, a New York corporation.

⁷⁶⁹ See particular apparent carelessness at *Fisher et al. v Symons General Insurance Company et al.* (Ont. C. J. 1991) LEXIS 855, *1 (‘the defendant Lloyd's of London’). For a rare correct US judicial characterisation, see *In re Route 202 Corp.*, 37 B.R. 367, 370 (“a group of individual insurers, known colloquially as Lloyd's of London”).

⁷⁷⁰ See for example *Suncorp Realty Inc. v PLN Investments, Inc. et al.*, 23 D.L.R. 4th 83, 96 (‘The only connection was that the “Siskina” was insured by Lloyds of London.’); *Bell v Tinnmouth et al.*; *Mowatt et al., Third Parties*, 53 D.L.R. 4th 731, 734 (“Such insurance was arranged by Adshead with Ed Tinnmouth, on his own behalf and on behalf of other members of the Institute of London Underwriters listed in the policy, commonly known as Lloyds of London”); *ibid.*, 39 D.L.R. 4th 595, 596 (‘The plaintiff's primary claim is for indemnification pursuant to an insurance policy taken out through the group of insurers in London commonly called “Lloyds of London”’); *Peka, Inc. v Kaye*, 145 N.Y.S.2d 156, 157 (“This is a motion by the underwriters doing business as Lloyd's of London, Ltd.”); *Leeb v Read*, 190 So. 2d 830, 830 (‘The plaintiffs had sought to recover under an insurance policy issued by the defendants, British insurance companies who do business as “Lloyds of London”’).

been a plaintiff⁷⁷³ and defendant in US litigation, and was recently erroneously described as the Membership vehicle in English litigation⁷⁷⁴ and in UK external insurance regulatory documents.⁷⁷⁵ It has also been used inappropriately in insurance documentation.⁷⁷⁶ Infelicity is compounded when judges use “Lloyd’s of London” to mean SYA participants and then abbreviate the error to “Lloyd’s”, confusing the trademark with the Corporation and intending neither; or using “Lloyd’s of London, an unincorporated association” as multiple error for the Corporation. The Corporation is sole owner of a currently dormant⁷⁷⁷ English company called Lloyd’s of London Limited,⁷⁷⁸ apparently incorporated and retained solely to secure the name.⁷⁷⁹

“Name”

- 3.90** “Name” is used indiscriminately regardless of the distinction between working and external Members,⁷⁸⁰ underwriting, non- and not-underwriting Members,⁷⁸¹ and natural and corporate Members,⁷⁸² and as one⁷⁸³ term to designate a SYA participant.⁷⁸⁴ It is best avoided.

⁷⁷¹ See *R v Council of the Society of Lloyd’s ex parte Carpenter and another* Queen’s Bench Divisional Court; (Crown Office List) CO/784/84 (Watkins LJ; “Lloyd’s of London is one of our great institutions”).

⁷⁷² See *Bath Iron Works Corp. v Certain Mbr. Cos. of The Inst. of London Underwriters* 870 F.Supp. 3, 4 (“Lloyd’s of London is not an insurance company but, rather, a marketplace for investor-underwriters”).

⁷⁷³ SYA participants have in US litigation sometimes sued, erroneously, in the name of “Lloyd’s of London”.

⁷⁷⁴ See for example the now obsolete *Practice Direction*, November 21, 1997 Estates of Deceased Lloyd’s Names, Appendix, draft affidavit, §2 (“... an underwriting member of Lloyd’s of London”) and *ibid.*, draft minutes of order, §1.

⁷⁷⁵ See for example Notice to Designated Former Members of Lloyd’s of London, [February] 1997, made by the Secretary of State for Trade and Industry under Insurance Companies Act 1982, s.44(1) and 45(1) (which requires former Members to keep Equitas Re informed of any change of address); Order by the Secretary of State under Insurance Companies Act 1982, s.68 as applied by Insurance (Lloyd’s) Regulations 1996 (SI 1996 No. 3011), §4, Designated Former Members of Lloyd’s of London, [February] 1997.

⁷⁷⁶ See for example the certificate in *Elmersham Ltd v Commissioners of Customs and Excise*; London VAT Tribunal; LON/83/371, (Transcript); 26 March 1984:-

THIS IS TO CERTIFY that in accordance with the authorisation granted under CONTRACT No. C 765 to the Undersigned by Lloyd’s of London, whose names and proportions written by them, which will be supplied on application, can be ascertained by reference to the said contract which bears the seal of Lloyd’s Policy Signing Office, and in consideration of the premium, the said Underwriters are hereby bound, each for his own part and not one for another, their Heirs Executors and Administrators, to insure the person(s) named herein for the benefits set out herein or endorsed hereon.

⁷⁷⁷ Lloyd’s of London Limited (registered number 3189123) RA fye December 31, 1998, p.1 (“Activities”); *ibid.*, fye December 31, 1997, p.2 (“Principal Activities”).

⁷⁷⁸ Incorporated as Storetip Limited on April 22, 1996 (registered number 3189123); name changed to Lloyd’s of London Limited on May 7, 1996. Simultaneously, company 3048034, incorporated by persons unconnected (so far as presently material) to the Corporation, changed its name from Lloyd’s of London Limited to Storewarn Limited (in its turn, the original name of Lloyd’s America Limited; registered number 3189026), and was dissolved by notice in the London Gazette of May 6, 1997.

⁷⁷⁹ See Lloyd’s of London Limited RA fpe December 31, 1996, p.1 (“Principal Activities”); “It was incorporated primarily for name protection purposes”; *ibid.*, RA fye December 31, 1997, p.2 (“Principal Activities”); *ibid.*, RA fye December 31, 1998, p.1 (“Activities”). “[I]ncorporated” is erroneous: the company was already incorporated by the name of Storetip Limited. The name protection came not from incorporation but from the subsequent change of name.

⁷⁸⁰ See Lloyd’s Act 1982, Sch. 1.

⁷⁸¹ See for example Membership Byelaw (No. 17 of 1993), §2(1) etc.

⁷⁸² See for example Membership Byelaw (No. 17 of 1993), §6(1).

⁷⁸³ Others include (for example) “Member of the Society” (Lloyd’s Act 1911, s.4); “underwriting member” (Lloyd’s Act 1982, s.8(1) and (2)); “member of the Society” (*ibid.*, Sch. 2, §(1) proviso); “member of Lloyd’s” (Insurance Companies Act 1982, s.2(2)(a)); “Lloyd’s underwriters” (*ibid.*, s.83 heading); “underwriter” (*ibid.*, s.83(2)); “members of Lloyd’s” (*ibid.*, s.83A).

⁷⁸⁴ SUA 1, parties. And see for example the then Chairman of Lloyds May 13, 1970 letter addressed to “all Underwriting Agents”, attached “Glossary of terms”, the term “Name” (“An Underwriting Member whose name appears on the list of those participating in any Syndicate at Lloyd’s is known as a “Name” on that Syndicate”)

“reinsurance” and RTC

- 3.91** The use of the word “reinsurance” in “reinsurance to close” (“RTC” in this book; the English judiciary do not appear to be thoroughly conversant with the meaning and use of the term⁷⁸⁵) is unfortunate: conventional RTC⁷⁸⁶ is materially different from conventional reinsurance.

“running off” and “in run off”

- 3.92** “In run-off” is a state: participants on a particular SYA have failed to buy outward RTC as at the earliest permitted moment. On the other hand, “running off” is a process, whereby the managing agency of the participants in a particular SYA administers — “runs off” — their relevant liabilities whether or not the SYA is “in run-off”.

“syndicate”

- 3.93** “Syndicate” is one of the most abused and misunderstood terms at Lloyd’s. The Lloyd’s enterprise’s principal activity is the carrying on of insurance business by Members, solely as participants on one or more YAs of one or more syndicates in one or more UYs, over a period of at least three YORs per SYA.⁷⁸⁷ A syndicate does not sell insurance and does not have members.⁷⁸⁸

“three year accounting”

- 3.94** “Three year accounting” is multiply defective.⁷⁸⁹ The term: (1) uses the word “year” (of which there are at least four types at Lloyd’s⁷⁹⁰) without the required specificity (a YOR⁷⁹¹ is intended); (2) misleadingly suggests that multi-YOR closing is principally concerned with accounting. Contrary to misconception,⁷⁹² every managing agency must supply *annually*, to every participant on every YA of every relevant syndicate, audited accounts as at December 31 of every YOR of that SYA;⁷⁹³ (3) is apt to misleadingly insinuate that the collectivised accounts of participants on a particular SYA will definitely be finalised — “closed” — as at the end of the SYA’s third YOR. The Rulebook at Lloyd’s does not presently require a SYA to close at three YORs or at any other time, or mandates sources of and prices for RTC, until which “multi-YOR closing” properly conveys, at most, the notion of a *minimum* number of YORs which the Rulebook at Lloyd’s requires to elapse before the managing agency of participants on a particular SYA is

⁷⁸⁵ See the incomprehensible use at *Judd v Merrett* [1997] LRLR 21, 22-23 (Leggatt LJ): “Mr. Pollock on the other hand, submits that business signed in a particular year of account includes business written into it. That is said to result from a market practice of treating a year’s business as including reinsurance to close, as well as pure year business”.

⁷⁸⁶ See p.207.

⁷⁸⁷ See incidentally Lloyd’s Act 1911, s.4, the Corporation’s own personal first formal object.

⁷⁸⁸ See p.186.

⁷⁸⁹ For misunderstanding, see for example *Treasury Sel. Comm. I*, §8; *MPs’ Interests*, p.v, §10: “Lloyd’s operates a three year accounting system. The results of underwriting in any year are normally not determined until a further two years have elapsed.” No such system operates at Lloyd’s. Accounting is not done three years in arrears. The accounts of a SYA in run-off are not determined every three years. And see the evidence of a Corporation employee at *ibid.*, p.9, §25 (“The three-year cycle”; there is no such cycle: each YA is wholly independent of any other YA). For multiple error verging on nonsense, see *In re Lloyd’s American Trust Fund Litig.* 96 Civ 1262 (RWS) (S.D.N.Y. 1998) LEXIS 1199: “The syndicates are “annual ventures” which underwrite insurance for one year and at the end of three years are to be “wound up”, with any outstanding liabilities and/or assets insured into a succeeding year’s syndicate.” Syndicates are not annual in any relevant sense; they are not wound up after three years; outstanding liabilities are not insured; there is no such thing as a “succeeding year’s syndicate”.

⁷⁹⁰ See p.205.

⁷⁹¹ See p.206.

⁷⁹² See for example *Treasury Sel. Comm. I*, §20 (p.xi; “[I]t is a quirk of Lloyd’s accounting system that results are published three years in arrears”). It is another matter when (May-June), how often (every calendar year as at December 31), and at what periodicity (three YORs in arrears) self-regulators-at-Lloyd’s happen to publish the consolidated results of participants on all SYAs budding in a particular UY — so-called “global results” or “global accounts” (usually misleadingly called “Lloyd’s global accounts”; they are not the Corporation’s accounts).

⁷⁹³ See relevant parts of the Syndicate Accounting Byelaw.

permitted to buy outward RTC, if it properly can; three YORs may be optimistic⁷⁹⁴ (and has been self-regulatorily prohibited⁷⁹⁵).

“underwriter” and “underwrite”

3.95 Self-regulators at Lloyd’s, statutory draftsmen⁷⁹⁶ and judges⁷⁹⁷ use the term “underwriter” *simpliciter* or “Lloyd’s underwriter”⁷⁹⁸ apparently indiscriminately to refer to a number of different categories of person,⁷⁹⁹ including (for example): (1) a managing agency,⁸⁰⁰ which sells insurance merely as each SYA participant’s contractual agent, not as a principal. Since the SYA-level passivity rule prohibits the SYA participant from having any executive involvement in any insurance transaction to which he is a party, reference in insurance contracts, policies, books, cases, the Rulebook at Lloyd’s, or elsewhere to “underwriters” *simpliciter* should be assumed to be erroneous shorthand for each relevant SYA participant’s managing agency;⁸⁰¹ (2) an active underwriter,⁸⁰² who sells insurance merely as a managing agency functionary and as each SYA participant’s common law agent. An active underwriter may happen also to be a SYA participant himself, to which extent he does sell insurance as a principal; (3) a SYA participant,⁸⁰³ who does not actively underwrite anything unless he happens to be an active underwriter, and who does always sell insurance as a principal. Compounding the confusion, SUA 1 / SCA 1 calls a passive SYA participant both “Name”⁸⁰⁴ (natural Member) and “corporate member”⁸⁰⁵ (corporate Member). The term “underwrite”, not defined⁸⁰⁶ in Lloyd’s Acts 1871-1982, is similarly habitually

⁷⁹⁴ See RRC 4, Sch. 2.

⁷⁹⁵ For example, in the case of the accounts of participants on SYA selling PSLI.

⁷⁹⁶ See for example Insurance Companies Act 1982, s.83 heading, “Requirements to be complied with by Lloyd’s underwriters”, s.83(2) (“every underwriter ...”), (4), (5)(a), (6), (7), and see the apparently capricious switch to “members of Lloyd’s” at *ibid.*, ss.83A, 84(1) and (2), 85(2)(a) and (3)(a), 86(1). For yet another approach, see for example Finance Act 1993, s.184(1) (“member”, which means “an individual who is a member of Lloyd’s and is or has been an underwriting member”). And see *ibid.*, definition of a “member’s” “underwriting business”:-

his underwriting business as a member of Lloyd’s, whether carried on personally or through an underwriting agent, and does not include any other business carried on by him, and in particular, where he is himself an underwriting agent, does not include his business as such an agent.

Note use of “underwriting agent” inconsistently with that of Lloyd’s Act 1982, s.2(1).

⁷⁹⁷ See for example the use of “underwriters” *simpliciter* in two different senses in the same sentence at *Berger and Light Diffusers Pty. Ltd. v Pollock* [1973] 2 Lloyd’s Rep. 442, 457, 460 (Kerr J): “I am satisfied that when the “cross-slip” was initiated by the two leading underwriters on Nov. 7 ..., a declaration under the open cover had been accepted which bound the underwriters within the terms of the open cover. If the ship had foundered on Nov. 8 underwriters would have been liable for a total loss.”

And see the egregious use of “underwriters” at *General Reinsurance Corporation v Forsakringsaktiebolaget Fennia Patria* [1983] 2 Lloyd’s Rep. 287, 289 (Kerr LJ).

⁷⁹⁸ *Code: Binders*, §11(i). Presumably “Lloyd’s underwriters” does not mean “Lloyd’s underwriters” but managing agencies.

⁷⁹⁹ See for example *Peninsular and Oriental Steam Navigation Co. v Youell* [1997] 2 Lloyd’s Rep. 136 (Potter LJ: *ibid.*, 136 (“defendant underwriters”) and *ibid.*, 138 (“Underwriters ... dealt with the matter less speedily”)) in which event only a prior knowledge of correct roles and terms will enlighten as to who or what is meant.

⁸⁰⁰ See for example

⁸⁰¹ Sometimes the active underwriter is meant, which may or may not be legally and or factually correct. On the active underwriter, see for example SUA 1, §3(b); Byelaw 4 of 1984, §1(a).

⁸⁰² See for example *Underwriting Room Seating Plan and Syndicate List* (Lloyd’s, February 2000), p.12 (“List of Lloyd’s underwriters, active syndicates”) and *ibid.*, p.13 (“List of Lloyd’s underwriters, ceased syndicates”). Note also the unhelpful use of “syndicates”.

⁸⁰³ See for example *Hayter v Nelson and Home Insurance Co.* [1990] 2 Lloyd’s Rep. 265 (Saville J; “the defendants ... who are Lloyd’s underwriters”); Lloyd’s policy boilerplate: “Now know Ye that We the Underwriters, Members of the Syndicates whose definitive numbers in the [after-mentioned / attached] List of Underwriting Members of Lloyd’s are set out in the Table ... and the due proportion for which each of Us, the Underwriters ...”.

⁸⁰⁴ SUA 1, parties.

⁸⁰⁵ SCA 1, parties.

⁸⁰⁶ Per SUA 1 / SCA 1, §1.1 “Underwriting” means “the business of underwriting and all related activities carried on by the Name and the other members of the Managed Syndicate at Lloyd’s as members of the Managed Syndicate[.]”

used misleadingly, both formally⁸⁰⁷ and colloquially.⁸⁰⁸ In describing the managing agency functionary empowered to sell insurance on behalf of SYA participants, one should never say “underwriter” *simpliciter*, since each SYA participant is an underwriter, but “active underwriter”; considerable is the confusion caused by the erroneous omission of “active”. The FSA Rulebook similarly uses “underwrite” in two different senses.⁸⁰⁹

“year”

3.96 Since there are at least six⁸¹⁰ types of “year” at Lloyd’s, use of the word “year” *simpliciter* at Lloyd’s (and in legal proceedings⁸¹¹) is usually confusing, misleading or meaningless. That a Member carries on business “from year to year” (commonly used by self-regulators-at-Lloyd’s) is meaningless and can be technically erroneous,⁸¹² as in the popular phrase at Lloyd’s “three-year accounting”. In the formal acknowledgment “I ... recognise that Lloyd’s is a market and that risks and rewards vary from syndicate to syndicate, and from year to year”,⁸¹³ does “year” mean:-

(1) a calendar year? A calendar year is an unhelpful and usually misleading⁸¹⁴ unit of measurement in the context of SYA participation. Compounding the confusion, the Rulebook at Lloyd’s sometimes uses “calendar year” to mean an UY,⁸¹⁵

(2) an underwriting year (occasionally used at Lloyd’s;⁸¹⁶ in this book, “UY”)? An UY, notionally January 1 to December 31 of a particular calendar year, is not a unit of time but a self-regulatory category. A syndicate buds YAs every UY, not only every calendar year: each SYA is specific to a particular UY. Results do differ between participants on SYAs budding in different UYs;

(3) a syndicate year of account (in this book, “SYA”)? A term essential to describing and understanding how insurance is sold and serviced at Lloyd’s, a SYA is not a unit of time but an ac-

⁸⁰⁷ See for example *Zeus Tradition Marine Ltd. v Bell (The “Zeus V”)* [1999] 1 Lloyd’s Rep. 703, 707 (Colman J; “The risk was written by the defendant, Mr. Bell, then at the JJ Thompson Syndicate”). The risk was underwritten by each participant on the relevant YA of the syndicate; Bell was merely those participants’ managing agency’s active underwriter.

⁸⁰⁸ In the typical phrase “I am underwriting [or more often “writing”] x pounds at Lloyd’s this year”, the number of pounds asseverated is merely deployed PIL, not the quantum of liability assumed.

⁸⁰⁹ See for example FSA Rulebook Glossary, definition of “making arrangements with a view to transactions in investments” (“... underwriting ... (c) the underwriting capacity of a Lloyd’s syndicate”) and *ibid.*, “former underwriting member”, “underwriting agent”, “underwriting capacity of a Lloyd’s syndicate”, “underwriting member”.

⁸¹⁰ In addition to the four “years” in the main text, there are financial years and policy years.

⁸¹¹ See for example *Mander v Equitas Ltd.* [2000] Lloyd’s Rep 520 (Morison J); “The Names of a Syndicate may change in relation to each accounting year, which is kept open for three years. Thus, if business is written towards the end of one year and the premium is paid at the beginning of the next, for whose account is the income to be credited?”). If the judge knew the correct terms — UY, SYA, YOR, calendar year, etc. — presumably he would have used them. The assertion “is kept open” is misconceived: the multi-YOR closing rule confers on the SYA stamp’s managing agency a mere power, not an obligation.

⁸¹² See for example *Improving the Annual Venture*, §7.1 (p.6; “... Extend the length of the standard agency agreement to ... 2 years”). SUA 1 / SCA 1 adheres to a particular SYA regardless of how many YORs elapse before it closes.

⁸¹³ See for example 1998 (undated) verification form, §(1). See also for example Byelaw 17 of 1993, §29(2) (“... otherwise than at the end of the year”). And see similarly for example *Strengthening Chain*, §3.68 (p.51): “The coming-into-line process measures the amount of FAL each member must hold to support the following year’s underwriting”. Both uses of “year” are unintelligible, as is, for example, recently, the use of “year” in *Napier and Ettrick v R. F. Kershaw Ltd.* {1c and 2c} [1999] 1 WLR 756, 765 (Lord Steyn).

⁸¹⁴ See for example *Arbuthnott v Fagan* {2b}; *Deeny v Gooda Walker Ltd.* [1996] LRLR 135, 137 (Bingham MR, referring to SMA 1; “After 1989 that form of agreement was superseded”).

⁸¹⁵ See recently for example *Code: Members’ Agency’s Responsibilities*, §7.10 (“A members’ agent which intends to operate a MAPA for the next calendar year ...”).

⁸¹⁶ See for example the then Chairman of Lloyd’s September 21, 1993 letter to Members attaching a notice convening the October 20, 1993 Corporation EGM, p.1 (“I have ... been concerned with the disruption that would be caused to the Society (and to our absolute priority to stabilise capacity for the 1994 underwriting year) ...”).

counting, collectivisation and self-regulatory device enabling its participants individually, in a coordinated, collectivised fashion, to enter into their own individual separate contracts with each assured-at-Lloyd's. Compounding the confusion, and notwithstanding the clear use in accounts and accounting instruments of "year of account" to mean a device rather than a period, self-regulators-at-Lloyd's and others sometimes use "year of account" to mean a calendar year,⁸¹⁷ an UY,⁸¹⁸ a SYA,⁸¹⁹ both a SYA and a UY in the same sentence,⁸²⁰ and sometimes nothing readily discernible.⁸²¹ Since each YA is a distinct, separate business collectivisation device, results do differ as between participants on different YAs of a particular syndicate and between participants on YAs of different syndicates, from which it is clear that "syndicate" *simpliciter* is usually meaningless and can be highly misleading.⁸²²

(4) a SYA's year of operation ("YOR", a coinage of this book)? A YOR is a unit of time — presently⁸²³ January 1 to December 31 of a particular calendar year — and an elementary⁸²⁴ measuring, analytic, reporting and self-regulatory tool curiously wholly absent from the Rule-book at Lloyd's. The life and financial development of every SYA should be measured in YORs. As its participants' liabilities are run off, their results do change between YORs of a particular SYA. Since a SYA does not necessarily close after three YORs and may be in run-off for many more, and the Member deploys PIL cumulatively — not (as is often insinuated) substitutionally — few myths at Lloyd's are more pernicious, and few statements less informative, than that SYA participation is an "annual venture".

Thus, an insurance contract is sold in a calendar year by a participant on a SYA (which budded in a particular UY), the transaction usually taking place, and the risk incepting, in the first YOR of that SYA's lifespan.

⁸¹⁷ SUA 1 / SCA 1, §1.1, definition of "year" ("a calendar year, except when used to refer to a year of account"). Note the confusion between the period and the device.

⁸¹⁸ See for example SUA 1 / SCA 1, §1.2(a)(i) ("in successive years of account" means successive UYs, not — note "in" — successive YAs); Reg. Bn. 7/2001, January 17, 2001 ("Capacity transfers in 2000"), App. 5, *x* axis; Reg. Bn. 33/2000, March 16, 2000 ("2001 premium income monitoring rates of exchange"), p.1 ("It has been the practice in the last few years to advise the market of rates of exchange to be used well in advance of the beginning of the relevant year of account"); Mkt. Bn. Y2243, March 22, 2000 ("Term life business"), p.1 ("with effect from the 2001 year of account ..."); Mkt. Bn. Y2187, December 6, 1999 ("Premium charge directions for 2000 year of account"); *Avon Insurance plc v Swire Fraser Ltd.* [2000] Lloyd's Rep IR 535, 537 (Rix J; "The claimants are stop loss insurers of a large number of Lloyd's Names for the 1990 and 1991 years of account ...").

⁸¹⁹ See for example SUA 1 / SCA 1, §3(f) ("subject to clauses 9.4 and 9.5 [and the proviso to clause 5] determine the premium for, and effect, the reinsurance to close for the Managed Syndicate in respect of each year of account"); *ibid.*, §9.1 ("Profits of the Underwriting in respect of a year of account shall not be distributed until that year of account is closed"), etc.; RRC 12, §3.6 ("For the purposes of clause 3.5 references to Relevant Years of Account include the 1993 years of account"), etc.

⁸²⁰ See for example SMA 2, §7.2(a) ("... the syndicates of which the Name is a member for a particular year of account does not exceed the Name's overall premium limit for that year of account"); Reg. Bn. 85/99, October 18, 1999 ("Premium income monitoring rates of exchange for new settlement currencies"), p.2 ("Syndicates will not generally be permitted to switch from [Currency Conversion Service] to settlement or vice versa other than at the commencement of each year of account for any particular year of account").

⁸²¹ See for example Byelaw 8 of 1988, §12(4).

⁸²² See p.186.

⁸²³ A YOR presently happens to run from January 1 to December 31, but there is no reason why it should, or why it should be a 12-month or any other period. See the error at *Daly v Lime Street Underwriting Agencies Ltd.* [1987] FTLR 277, 279 (Staughton J: "The accounts of a syndicate for business undertaken in a calendar year remain open for the two years next ensuing" — confusing YORs with calendar years).

⁸²⁴ See for example self-regulators'-at-Lloyd's incoherent *Instructions for the guidance of Auditors*, December 23, 1909: "A statement will also be produced of the percentage of settlements for the second and third years, on the years 1904, 1905 & 1906 1907 account: the estimate of the third year's settlements will be made by taking the average percentage of the third year's settlements in 1904, 5 & 6."

Note the missed opportunity to use "YOR", "SYA" and "UY", and the misguided implication that "1904, 1905 and 1906" refers to calendar years or even UYs.

RTC

overview

- 3.97 RTC — six⁸²⁵ types of which are identified in the Rulebook at Lloyd's (there is also a FSA definition⁸²⁶) — is not⁸²⁷ properly described at Lloyd's and apparently has never been fully considered by any English court.⁸²⁸ The alleged⁸²⁹ *locus classicus*⁸³⁰ on conventional RTC is materially

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Per Syndicate Accounting Byelaw (18 of 1994), Sch. 1, §1: "reinsurance to close" means:-

(a) an agreement under which underwriting members (the "reinsured members") who are members of a syndicate for a year of account (the "closed year") agree with underwriting members who constitute that or another syndicate for a later year of account (the "reinsuring members") that the reinsuring members will discharge or procure the discharge of, or indemnify the reinsured members against, all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year of account, in consideration of: (i) a premium; and (ii) either (aa) the assignment, or agreement to assign, to the reinsuring members of all the rights of the reinsured members arising out of or in connection with that insurance business (including without limitation the right to receive all future premiums, recoveries and other monies receivable in connection with that insurance business); or (bb) an agreement by the reinsured members that the reinsuring members shall collect on behalf of the reinsured members the proceeds of all such rights and retain them for their own benefit so far as they are not applied in discharge of the liabilities of the reinsured members;

(b) an agreement underwritten by members of one or more syndicates and complying with requirements made under paragraph 2(3) of this byelaw;

(c) a syndicate run-off reinsurance contract between members of a syndicate for a year of account and Centrowrite Limited, Lioncover Insurance Company Limited, Equitas Reinsurance Limited or any other insurance company which is designated by the Council for the purposes of this definition and is an authorised person with permission to effect or carry out contracts of insurance whereby that insurance company agrees to indemnify the members of the syndicate for that year of account against all known and unknown liabilities arising out of insurance business underwritten through the syndicate and allocated to that year of account;

(d) in relation to the 1992 year of account or any earlier year of account of any syndicate whose members have underwritten general business, the Equitas Reinsurance Contract;

(e) in relation only to the 1993 year of account, 1994 year of account or 1995 year of account of any syndicate whose members have underwritten general business, the Equitas Reinsurance Contract, taken together with an agreement such as is referred to in sub-paragraph (a) modified so as to reinsure the reinsured members in relation only to such of the insurance business underwritten through that syndicate and allocated to that year of account as has not been reinsured under the Equitas Reinsurance Contract; [or]

(f) in the case of a syndicate consisting only of a single corporate member which is not closed by reinsurance to close by another person, the inclusion in the underwriting account of that syndicate for the next following year of account of an amount representing a provision for all known and unknown liabilities attributable to the year of account which is closing; and for the purposes of this byelaw, the amount representing such provision shall be treated as premium in respect of such reinsurance to close[.]

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See FSA Glossary, definition of "reinsurance of close":-

(a) an agreement under which members of a syndicate in one syndicate year ("the reinsured members") agree with the members of that syndicate in a later syndicate year or the members of another syndicate ("the reinsuring members") that the reinsuring members will discharge, or procure the discharge of, or indemnify the reinsured members against, all known and unknown insurance business liabilities of the reinsured members arising out of the insurance business carried on by the reinsured members in that syndicate year; or (b) a similar reinsurance agreement or arrangement that has been approved by the Council as a reinsurance to close.

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The conventional RTC contract is uninformative and gives the false impression that RTC is reinsurance; the insurance contract between the SYA participant and the assured-at-Lloyd's is uninformative to the extent it suggests that the *originalis* is forever liable. The true nature of RTC must be deduced from relevant standard agency agreements and other Rulebook at Lloyd's provisions.

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Elementary Rulebook at Lloyd's provisions do not appear to have been considered properly or at all in (for example) *Lloyd's v Clementson* {2} [1997] LRLR 175 (Cresswell J) or *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265, 364 (Cresswell J); and see incidentally *Toomey v Eagle Star Insurance Co. Ltd.* {1} [1994] 1 Lloyd's Rep. 516 (CA; whole account run-off reinsurance); *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd's Rep. 618 (Potter J).

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Anecdotally, Equitas Re has so represented.

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Viz., Unisys Corporation v Insurance Company of North America, Docket No. L-1434-94-S, *Uniroyal Inc. v American Re-Insurance Co.*, Docket No. L-8172-94, Deposition of Stewart Boyd QC, November 15, 1999 and November 16, 1999. The deposition contains numerous infelicities of which the following is a small selection: (1) RTC as reinsurance: *op. cit.*, p.95-6 ("The reinsuring syndicate assumes a new independent liability to the reinsured syndicate — and to the reinsured syndicate alone — which is an obligation to indemnify the reinsured syndicate against that syndicate's own liabilities to the policy holders. ... The reinsuring syndicate does not accept any obligation towards the policy holder, its obligations are owed to the reinsured syndicate and to the reinsured syndicate alone"); *ibid.*, p.101 ("copper-bottomed reinsurance to close"); *ibid.*, p.123 (Q: "Is reinsurance to close considered outward reinsurance?" A: "Yes"); *ibid.*, p.174 ("The reinsurance to close is just an ordinary reinsurance It's no different from any other reinsurance as far as I can see"): error: conventional RTC is incapable of being reinsurance because the conventionally outward-RTCd SYA participant is incapable after the RTC transaction of ever suffering an insurable loss); (2) conventional RTC's effect on the liability of the

erroneous. Broadly, conventional RTC is a device to extricate a participant on one SYA from his insurance liabilities and infiltrate them into the accounts of a participant on another SYA; for the managing agency, it is a device to carry losses forward. Technically, RTC is whatever device self-regulators-at-Lloyd's (in conjunction, as appropriate, with external insurance regulators) determine is to have, and which actually does then happen to have, the effect of closing the collectivised accounts of participants on a particular SYA.⁸³¹ RTC's place in the Lloyd's enterprise is (for example) to facilitate a steady flow of Members out of SYAs; to facilitate (and it requires) a steady flow of (traditionally not fully informed) Members into SYAs; to infiltrate old liabilities into fresh accounts; and to enable SYA participants to take "profit" and members' and managing agencies to take "profit commission". In the hands of a managing agency (typically acting for both sides) whose aspiring outward-RTced SYA participants have unquantifiable liabilities (typically acquired on their behalf by that managing agency), RTC is a self-regulatory licence to defraud (among others) the inward-RTcing SYA participants. The following points about RTC — the technique traditionally employed at Lloyd's to (among other things) reserve for the unreservable — are not irrelevant to EquitasRe-RTC:-

conventionally outward-RTced SYA participant: *op. cit.*, p.95 ("The liability that they [the conventionally inward-RTcing SYA participants] assume is not the same as the liability of the reinsured syndicate": error: it is identical); *ibid.*, p.96-7 (Q: "If I understand what you are saying, do you disagree ... that reinsurance to close is a mechanism by which names' liabilities are transferred from one set of names to another?" A: "Yes, profoundly."); *ibid.*, p.98-9 ("There is no transfer of liabilities from the reinsured year to the reinsuring year. There is no undertaking responsibility to the policy holder"); *ibid.*, p.100 (A: "Would it be correct to say, Mr. Boyd, that once reinsurance to close has been effected, the names on the syndicate which has been closed remain technically liable?" A: "Well, they remain liable. I don't regard that as a technicality any more than any other aspect of the reinsurance to close"); *ibid.*, p.118 ("[T]here is no agreement in any of the reinsurance to close wordings that the policy holder releases the reinsured syndicates from their liabilities": misleading (especially given *ibid.*, p.121 ("I understood that I was being asked to give evidence about the *practice* of reinsurance to close at Lloyd's ..."; italics added) as to what actually and of necessity happens at Lloyd's, *viz.*, novation); *ibid.*, p.138 (conventional RTC "leaves entirely unaffected the obligation of the members of the reinsured syndicate towards their policy holders": error: conventional outward-RTC exonerates the conventionally outward-RTced SYA participant completely); *ibid.*, p.148 ("[A] name at Lloyd's remains liable to the policy holders of policies on whom his name appears as a subscriber, despite his resignation from Lloyd's and despite his death": error and confusion: death has no effect on, whereas effective resignation terminates, Membership; also, the effect of conventional RTC, and the reason that self-regulators at Lloyd's permit an underwriting Member's resignation to take effect, is that he does not and as an administrative matter cannot remain liable). And see *ibid.*, p.161, ll.22-25 to p.162, ll.1-3; (3) Lloyd's byelaws as subordinate legislation: *ibid.*, p.171-2 (replying to a question to the effect: "is the 'Lloyd's agency agreement a public document?": A: "I believe that it's now a prescribed form and that it has been for some time, and it's therefore part of a Lloyd's byelaw and accordingly a public document because it forms part of subordinate legislation deriving from statutory authority": error: byelaws at Lloyd's are not subordinate or any other form of legislation); (4) the conventionally inward-RTcing SYA participant as delegate: *ibid.*, p.139 ("the reinsurer to close in the case of a syndicate reinsuring another syndicate to close ... has delegated powers from the names on the reinsured syndicates to handle claims and to defend, settle, and investigate them and so forth" (and see similarly at *ibid.*, p.100): error: conventionally outward-RTced SYA participants do not, cannot and need not delegate anything to anyone: the conventionally inward-RTced liabilities are wholly assumed by the conventionally inward-RTcing SYA participants and run off by the latter's mutual managing agency accordingly). The deponent does not appear to be familiar with elementary Rulebook at Lloyd's provisions bearing directly on conventional RTC: see for example *op. cit.*, p.184 (Q: "Does the Lloyd's agency agreement refer in any way to reinsurance to close?" A: "I shouldn't be surprised but I haven't looked at it recently and I don't know sorry. Forgive me. I'm talking about the prescribed form of Lloyd's agency and subagency agreements ...". The last quoted sentence is a *non sequitur* to the antepenultimate quoted sentence). See similarly *ibid.*, p.113-4 (Q: "Can you point to any pre 1996 document that states that reinsured to close names are liable to policy holders and the reinsuring to close names are not liable to policy holders?" A: "Well, that's a rather difficult question to answer. I'm not saying that there aren't any, but I haven't seen any in the course of preparing for this testimony").

The deponent's testimony also appears to be inconsistent: compare for example *op. cit.*, p.100, 118, 138 etc. (conventionally outward-RTced SYA participant continues to be liable to the assured-at-Lloyd's) with *ibid.*, p.182-3 ("Once a syndicate has acquired a reinsurance to close protection from another syndicate, there are no retained risks to reinsure as far as the reinsured syndicate is concerned and it would be a waste of money and effort to buy further reinsurance" — note the implication that RTC is a form of reinsurance). See similarly *ibid.*, p.188 ("I think it's unlikely that any of the names were called upon to make any contribution in respect of liabilities to policy holders where they had reinsurance to close in respect of those liabilities").

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RTC facilitates a steady flow of Members out of SYAs; facilitates and requires a steady flow of (not always fully informed) Members into SYAs, and is the only way to ascertain and distribute "profit" to SYA participants — and "profit commission" to their mutual managing agency.

(1) conventional RTC — which involves a potentially endless number of mutually binding⁸³² “pass the parcel”⁸³³ refresher transactions to the personal-use funds of each inward-RTcing SYA participant — effects deep extrication for each outward-RTced SYA participant, who then becomes and remains irrelevant,⁸³⁴ of legal, administrative and financial necessity. Conventional RTC effects comprehensive, deep infiltration for the inward-RTcing SYA participant,⁸³⁵ who then becomes, *pro tem.*, the only relevant SYA participant.⁸³⁶ He consents⁸³⁷ in advance to discharging, as if they were his own pure-YA insurance liabilities, all RTC-infiltrated liabilities. The transaction is usually accomplished by the putative outward-RTced SYA participants’ mutual managing agency quantifying (if it can) a RTC premium — and taking a profit commission where the RTC premium permits a profit to be alleged — and then encontracting⁸³⁸ his principals with the inward-RTcing SYA participants, for whom the managing agency typically also acts. Because RTC is usually effected into a proximate SYA, there will usually be considerable commonality of participants on the two SYAs. The liabilities transplanted to the inward-RTcing SYA participants, the latters’ managing agency runs them off⁸³⁹ for a fee plus expenses;

⁸³² SUA 1 / SCA 1, §9.2:-

A decision by the Agent to close a year of account [in accordance with §5(d)] shall be effected by the Agent, through the active underwriter of the Managed Syndicate or some other duly authorised officer of the Agent, executing a written memorandum of the terms of the contract of reinsurance to close. Upon the execution of the memorandum the contract of reinsurance to close shall be binding on the reinsuring members and the reinsured members. . . , and after such execution the Agent shall have no authority to cancel or vary the contract of reinsurance to close.

⁸³³ See for example SUA 1 / SCA 1, §3(p), empowering a managing agency to “run off the business of the managed syndicate in respect of any year of account until such time as the liabilities arising out of that business are covered by reinsurance to close.”

⁸³⁴ The conventionally outwardly-RTced SYA participant is completely irrelevant for all purposes because he (for example): cannot participate in run-off because he has no managing agency; is incapable of performing any insurance contract; never pays (and can never default on) any claim on any outward-RTced contract (no default access to any common-use fund); is incapable of having any insurable risk under any outward-RTC contract; never claims on any RTC contract; is never paid or reimbursed by any inward-RTcing SYA participant; is never sued; never defends. Conventional RTC effects his complete, comprehensive, total, permanent, irrevocable, absolute extrication at Lloyd’s and by external insurance regulators: the notion of any outward-RTced SYA participant retaining the slightest (insurance-contract or any other contractual) liability to any person (especially the assured-at-Lloyd’s) is unsupportable. The extrication principle is recognised at RRC 4, §3.3.

⁸³⁵ SUA 1 / SCA 1, §5(e) empowers the managing agency to “determine (subject to any requirements of the Council) to which year of account the benefit and burden of any contract of insurance should belong, irrespective of the date of acceptance of a risk or the signing of a policy”. And see *ibid.*, §9.2A: “A decision by the Agent to close a year of account in accordance with clause 5(ad) shall be effected by the Agent by the inclusion in the underwriting account of the Managed Syndicate for the next succeeding year of account of an amount representing a provision for all known and unknown liabilities attributable to the year of account which is closing.”

⁸³⁶ The conventionally inward-RTcing SYA participant (2) conventionally inward-RTcing SYA participant is the only relevant SYA participant. He (for example): can and does participate in run-off because he has the managing agency; assumes liability as if “pure YA” liability; always pays claim until himself outward-RTced; personal-use funds default cured by common-use funds; never reimburses any outward-RTceds; is always sued; always defends. Conventional RTC effects deep substantive, procedural and financial Lloyd’s-securitised infiltration into his relevant accounts.

⁸³⁷ SUA 1 / SCA 1, §7.4: “The Name acknowledges that risks underwritten at a time when he was not a member of the Managed Syndicate (whether by reinsurance to close or under clause 8 or otherwise) may be included as liabilities of the Managed Syndicate and the Name hereby agrees that he will be bound by the manner of the Agent’s accounting treatment of any such risks.”

⁸³⁸ See for example the conventional RTC contract quoted in *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd’s Rep. 618, 622 (Potter J):-

“IN CONSIDERATION of the payment to us of a sum of • the receipt of which amount we hereby acknowledge, we hereby undertake each for his own part and not one for another, to pay and make good in the proportions shown below against our respective Names all Claims, Returns, Reinsurance Premiums and the like taken down on and after 1st January [year], against the [UY] Underwriting Account of Syndicate • PROVIDED ALWAYS that there shall be paid to and retained by us all Premiums, Salvages, Refunds and Reinsurance Recoveries which may be taken down on behalf of the Reassured Account on and after the 1st January [year].”

Cf. RRC 4, recitals (F) and (j); *ibid.*, §§3.1, 3.2.6.11; *ibid.*, Sch. 2, §1 definition of “reinsurance to close”.

⁸³⁹ SUA 1 / SCA 1, §3(p) empowers a managing agency to “run off the business of the Managed Syndicate in respect of any year of account until such time as the liabilities arising out of that business are covered by reinsurance to close.”

(2) there is no difference in the financial fundamental of conventional RTC and EquitasRe-RTC. Each embeds the RTCed liability within the Lloyd's enterprise, and ensures the immutable availability to the assured-at-Lloyd's of common-use funds regardless of the particular individual SYA participant and his personal-use funds. Conventional RTC renders UYs and SYAs irrelevant for securitisation purposes. What does appear to exist peculiarly in the former type is novation-by-usage.⁸⁴⁰ That there is no novation in the latter is irrelevant: both the original and the novated SYA participant are only of peripheral, back-office relevance to the assured-at-Lloyd's in the first place.

unfounded popular notions

3.98 The following popular notions about RTC are particularly unfounded:-

(1) that privity is a relevant concept. The conventionally outward-RTCed *originalis* is utterly extricated from all back-office liability under the RTCed insurance contract;

(2) that any part of R&R has the effect of depriving the EquitasRe-assured-at-Lloyd's of recourse to the EquitasRe-reinsured SYA participant, *viz.*, to the latter as a conduit to relevant personal-use and common-use funds, or in any other legal sense leaching any EquitasRe-reinsured liability away from relevant claims payment securitisation or other relevant funds at Lloyd's. RRC provisions prejudicing the EquitasRe-assured's-at-Lloyd's recourse to relevant assets at Lloyd's are notable by their absence.⁸⁴¹ The EquitasRe-assured-at-Lloyd's is not bound by RRC 4,⁸⁴² is not bound to settle⁸⁴³ with Equitas Re, is not bound by Equitas Re's insolvency,⁸⁴⁴ and is not bound by RRC 4, Sch. 3 or RRC 5, Sch. 3 proportionate cover. The notion apparently held⁸⁴⁵ by self-regulators at Lloyd's that R&R necessarily ensures the financial survival of the Lloyd's enterprise is thus based on a false premise;

(3) that an EquitasRe-assured-at-Lloyd's is inescapably and exclusively dependent on funds belonging to or within the control of Equitas Re, which appears especially crystallised by Equitas Re's direct communication with, and dispensing of money directly to, claimant EquitasRe-assureds-at-Lloyd's to the apparent legal, administrative and financial exclusion of any relevant component of the Lloyd's enterprise. Unless the EquitasRe-assured-at-Lloyd's himself precludes his own recourse (discussed in this Chapter) to relevant assets at Lloyd's, either by settling his claim or, possibly, by obtaining a coverage judgment or award against Equitas Re alone, such recourse is available to him in the ordinary way, and Equitas Re's assets and solvency, and other facets of its own personal closed financial system such as proportionate cover, are of marginal relevance to him and no relevance to the recourse process itself;

(4) that conventionally at Lloyd's, an assured-at-Lloyds will have to bring or consider bringing mere collection proceedings against a SYA participant. Because of common-use and other relevant assets at the Lloyd's enterprise, mere collection suits against SYA participants are believed to be practically unknown. The extent to which the EquitasRe-assured-at-Lloyd's, having precluded himself from recouring relevant common-use funds by settling, may have to bring col-

⁸⁴⁰ See *Astor's Law of Lloyd's*, 2nd Ed.

⁸⁴¹ See p.99.

⁸⁴² See for example RRC 4, §3.7; RRC 5, §2.6.

⁸⁴³ See p.84.

⁸⁴⁴ See generally Chapter 4.

⁸⁴⁵ See for example *The Sunday Times*, April 14, 2002, *Business*, p.7 ("Footing the bill in a high-risk world" — interview with the Corporation's CEO; "Back in 1995 there was a question mark over whether [the Lloyd's enterprise] was going to survive, so being involved at the heart of a plan to make sure that it did couldn't have been a more fascinating ... challenge ...").

lection proceedings against an EquitasRe-reinsured SYA participant following Equitas Re's financial demise is an open question;

(5) that the EquitasRe-reinsured SYA participant is vulnerable to suit from any other relevant party in relation to any EquitasRe-reinsured liability. No back-office⁸⁴⁶ collection suit against an EquitasRe-reinsured SYA participant can properly be maintained by a relevant members' agency or managing agency, or by the Corporation, to the extent of the releases contained in RRC 1;⁸⁴⁷

(6) that a conventionally outward-RTCD *originalis* is liable on the insurance contract. Material put out by self-regulators-at-Lloyd's on this point is profoundly misleading.⁸⁴⁸

⁸⁴⁶ See p.169.

⁸⁴⁷ See p.169.

⁸⁴⁸ See for example *SOD*, p.137-138 (“Dead Man’s Stop”):-

A variation on the theory that members might be better off if Lloyd's went into run-off is the argument that, in a winding-up of the market, policyholders would be forced to sue on the original insurance policies, some of which were written many years ago. The proponents of this theory argue that these policyholders would be ‘stopped in their tracks’ to the extent that the original Lloyd's underwriting members are dead or bankrupt. Alternatively, it is argued that if the policyholders were to be forced to sue on the original policies they would only be able to enforce their claims against the members on the relevant open year by virtue of the chain of intervening RITC contracts. If these RITC contracts could be broken for material non-disclosure or fraud, policyholders would also be stopped in their tracks. This is misconceived, because: policyholder claims do not cease or disappear if the original members have died or become bankrupt. Their estates remain liable and are entitled to the benefit of the indemnity from the members on the succeeding syndicate pursuant to the RITC. The obligations under RITC contracts, in their customary form, are not dependent on the original insurers' ability to pay[.]

4: Insolvency

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Sub-chapter 1: orientation

EQUITAS RE'S INSOLVENCY

relevance to the EquitasRe-assured-at-Lloyd's

4.1 In at least the following senses, Equitas Re's insolvency appears to be irrelevant to the EquitasRe-assured-at-Lloyd's:-

(1) operation of law: there appears to be no rule of English law entitling, permitting or inviting an EquitasRe-reinsured SYA participant, or any component of the Lloyd's enterprise — whether or not purporting to be solvent and continuing to do business as usual — to unilaterally impose on any EquitasRe-assured-at-Lloyd's a novation of any insurance contract to any solvent or insolvent reinsurer. Nor has any novation been by mere operation of law effected in the case of any EquitasRe-reinsured insurance contract;

(2) express or implied contractual provisions: though RRCs 4, 5 and 7 all contain provisions applicable to "Insurance Creditors" — though no EquitasRe-assured-at-Lloyd's is party to any such contract, and each is expressly¹ excluded from being a third-party beneficiary of RRC 4 — no R&R contract has, purports or seeks to have the effect of discharging, novating or varying any insurance contract made by any EquitasRe-reinsured SYA participant to the exclusion of the EquitasRe-assured's-at-Lloyd's relevant available recourse to common-use funds at the Lloyd's enterprise. RRC 4 (from the benefit of which every EquitasRe-assured-at-Lloyd's is expressly excluded) expressly professes to have no effect on any EquitasRe-reinsured SYA participant's liability for any relevant insurance contract;²

(3) available-by-express-right³ common-use funds: nothing about R&R appears to derogate from the EquitasRe-assured's-at-Lloyd's existing recourse to available-by-express-right⁴ common-use funds at the Lloyd's enterprise. No relevant available common-use claims payment securitisation fund instrument conditions recourse on Equitas Re's solvency or insolvency. EATD permits⁵ the LATD trustee to use EATD funds to pay a LATD liability 100% even though Equitas Re and or Equitas Ltd. is insolvent. Lloyd's US Surplus-Lines Common-Use Trust Deed and Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed do not mention Equitas Re;

(4) arguably-available⁶ funds at the Lloyd's enterprise: nothing about Equitas Re's insolvency appears to undermine — indeed, that insolvency would appear to strengthen — the EquitasRe-assured's-at-Lloyd's arguments that such funds be made available to pay his claim.

It follows that the EquitasRe-assured's-at-Lloyd's valid claim on a valid EquitasRe-reinsured insurance contract is not reduced or in any way affected by any Proportionate Cover Rate or Proportionate Cover Plan; is not required to prove in Equitas Re's insolvency; is not required to accept any distribution from Equitas Policyholders Trustee; is not by Equitas Re's insolvency in

¹ See RRC 4, §3.7; and see similarly RRC 5, §2.6.

² See for example RRC 4, recital (J) ("... no effect on the liability of any Name or Closed Year Name under *any* original contract of insurance ..."). Italics added.

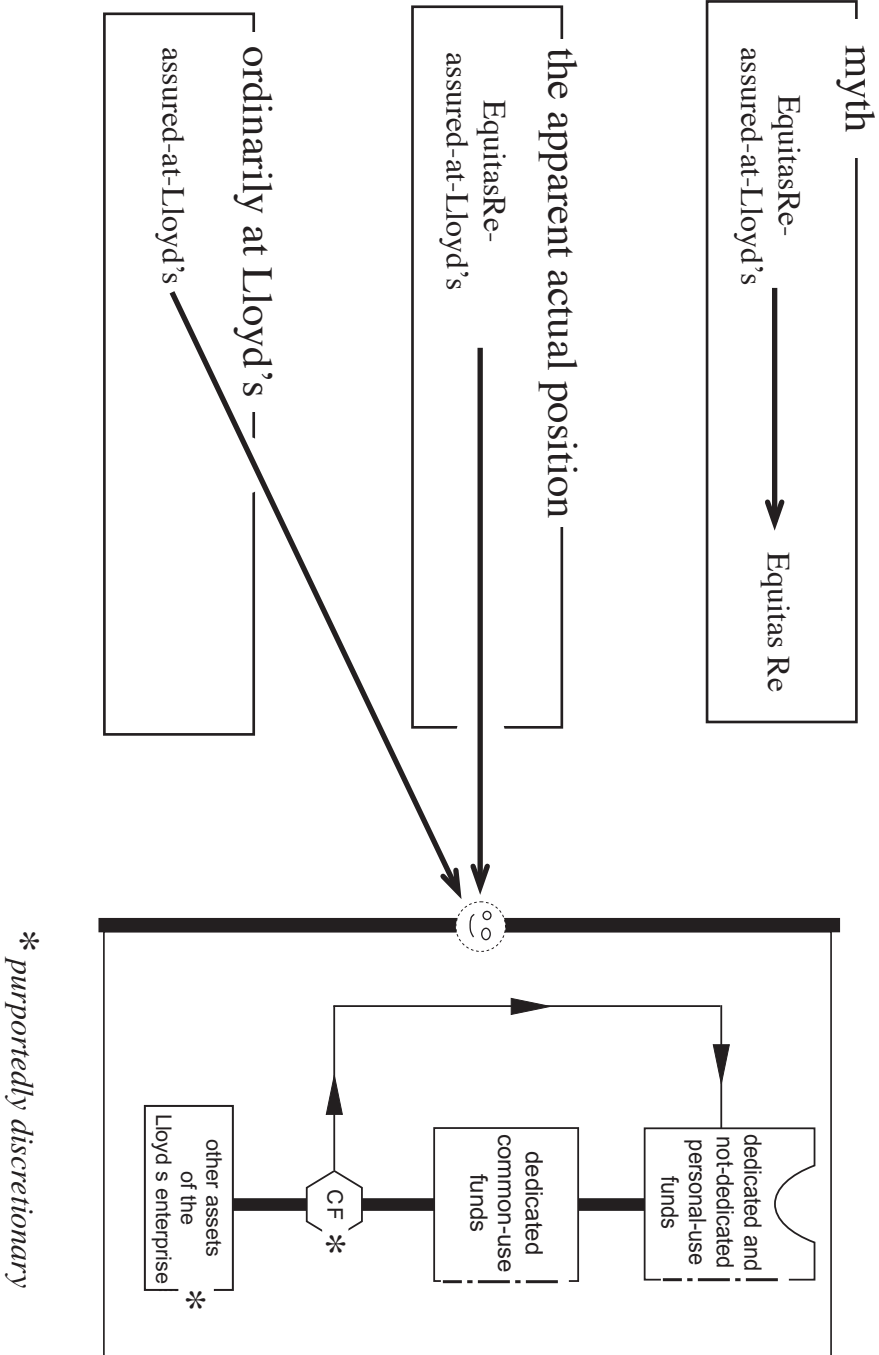
³ See Chapter 3, Sub-chapter 1.

⁴ See Chapter 3, Sub-chapter 1.

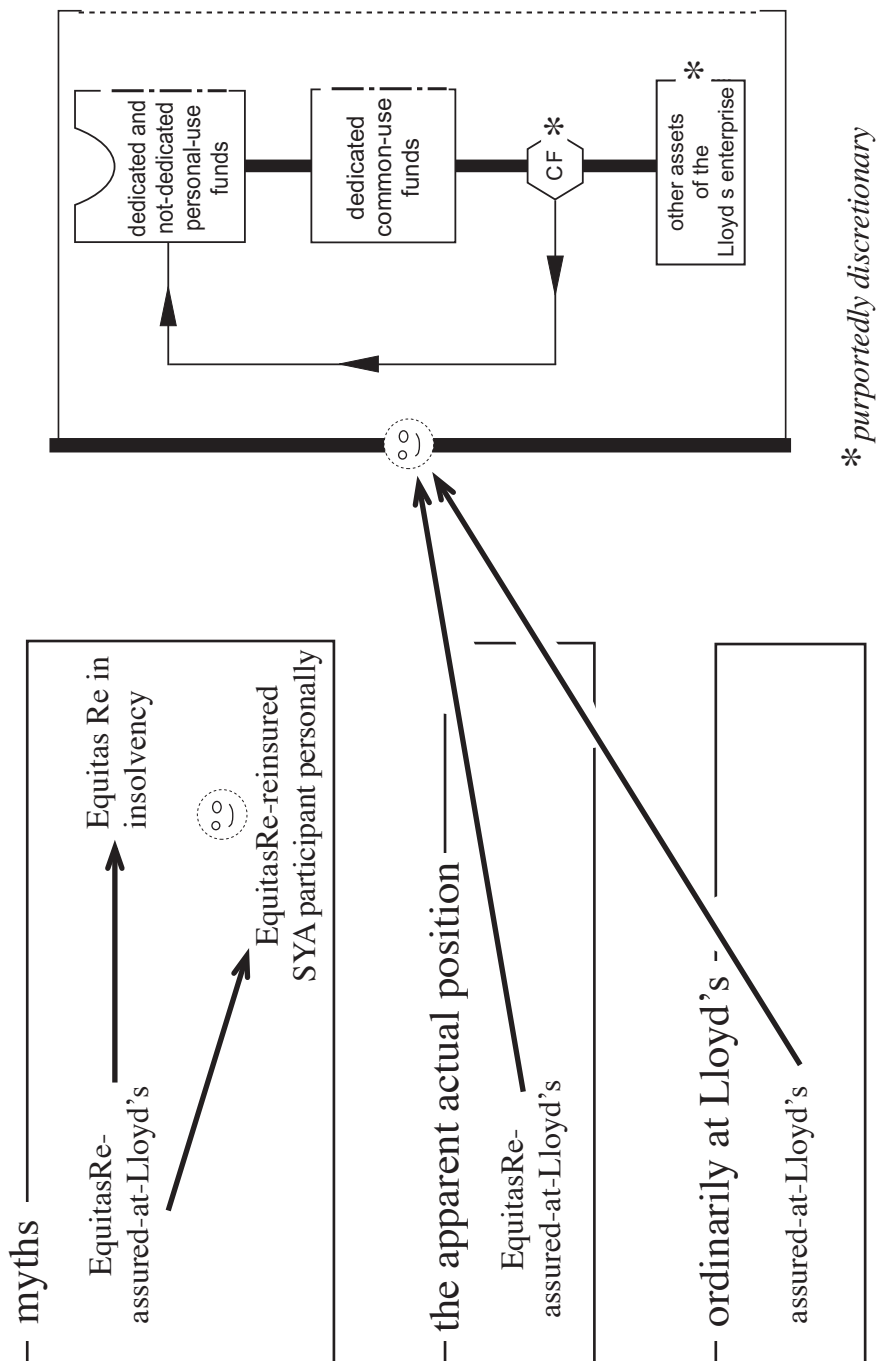
⁵ See EATD, §4(b).

⁶ See Chapter 3, Sub-chapter 2.

securitisation at a solvent Equitas Re: myth and apparent reality



securitisation at an insolvent Equitas Re: myth and apparent reality



any way prejudiced — indeed in various senses his position may be enhanced — in his recourse to relevant common-use funds at the Lloyd's enterprise.

Equitas Re's susceptibility to insolvency law

- 4.2 None of the Equitas enterprise's various entities or relevant individuals has any express or inherent exemption from ordinary English corporate or insurance insolvency law.⁷ However, the FSA's so-called "scope of permission" notices (which replaced as at December 1, 2001 the DTI's Notices of Requirements) for Equitas Re and Equitas Ltd. — apparently not public documents⁸ — may confer some secret privilege or enable the FSA to bestow some latitude in relation to either company's solvency or insolvency⁹ (it is believed¹⁰ that each company is required to make certain private FSA filings). The apparent regulatory secrecy is not otherwise explicable.

Equitas Re's susceptibility to insolvency

- 4.3 Equitas Re's actual financial insufficiency is anticipated in various contexts in RRCs and other instruments. Repeatedly mentioned in *SOD*,¹¹ it permeates Equitas Re's "Certified Reinsurance Trigger Events"¹² and "Automatic Reinsurance Trigger Events",¹³ and Equitas Ltd.'s "Certified Trigger Events"¹⁴ and "Automatic Trigger Events".¹⁵ EATD uses the predicate "inadequacy" rather than "insolvency" using Insolvency Act 1986, s.123¹⁶ insolvency as one determinant;¹⁷ Lloyd's US Surplus-Lines Common-Use Trust Deed and Lloyd's US Credit-for-Reinsurance

⁷ See for example Insolvency Act 1986; numerous provisions in Companies Acts 1985 and 1989; Insolvency Rules 1988 (1988 SI 1925); Insurers (Winding Up) Rules 2001 (2001 SI 3635); Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (2001 SI 2634).

⁸ FSA source.

⁹ And see FSA's July 18, 2001 written response to the Author's questions:-

Does the FSA practice extra vigilance for sensitive insurance companies such as Equitas, or companies that are close to insolvency, or companies alleged in the media to be close to insolvency? The FSA is putting in place a regime under which the level of resources allocated (e.g. to the supervision of an authorised insurer) varies according to an assessment of the risk to the FSA's statutory objectives. This is explained in more detail in the FSA publication "Building the New Regulator - progress report I" issued December 2000. As far as Equitas is concerned, the FSA cannot comment or speculate on the affairs of individual companies.

Is any information on such processes publicly available? The FSA would choose appropriate tools from their regulatory toolkit, that best respond to the firm's particular circumstances. For example, restrictions might be imposed on an insurance company close to insolvency to prevent that company from entering into new contract of insurance, or certain types or classes of insurance.

¹⁰ The basis for the belief is the following July 18, 2001 written indication from a senior FSA official in response to the Author's question: "What returns do Equitas file with [FSA] in addition to the normal annual returns? FSA cannot comment on the affairs of individual companies."

¹¹ See for example *SOD*, p.132: "In the event that Equitas were unable to make payments in full"; "If Equitas were to cease to meet claims ... in full"; "If Equitas were to fail to meet its liabilities in full"; "if Equitas' assets are insufficient to meet these liabilities".

¹² See RRC 4, Sch. 3, §2.1.

¹³ See RRC 4, Sch. 3, §2.3.

¹⁴ See RRC 5, Sch. 3, §2.1.

¹⁵ See RRC 5, Sch. 3, §2.1.

¹⁶ Insolvency Act 1986:-

s.123 — Definition of inability to pay debts — (1) A company is deemed unable to pay its debts (a) if a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding £750 then due has served on the company, by leaving it at the company's registered office, a written demand (in the prescribed form) requiring the company to pay the sum so due and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, or (b) if, in England and Wales, execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or ... (e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due. (2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities. (3) The money sum for the time being specified in subsection (1)(a) is subject to increase or reduction by order under section 416 in Part XV.

¹⁷ At EATD, §12(a)(2).

Common-Use Trust Deed each use the predicate “insolvency” in virtually identical terms;¹⁸ and proportionate cover at Equitas Re¹⁹ or Equitas Ltd.²⁰ is a response to rather than a means of forestalling insolvency as commonly understood: far from protecting Equitas Re, proportionate cover is capable of hastening the EATD's deemed “inadequacy”.²¹ Insolvency at Equitas Re is likely to have wide-ranging incidents.²² Disavowing²³ a policy of not discharging its RRC 4, §3 obligations unadjusted²⁴ and in full (while, it is anecdotally said, insistently predicting in settlement discussions its own imminent demise), Equitas Re aspires to settle *ibid.*, §3 claims at 37%²⁵ and seeks (for example²⁶) comprehensive irrevocable policy buy-backs, with Equitas Re and Equitas Ltd. as express third-party beneficiaries.²⁷ Such conduct appear to be to some extent founded neither on Equitas Holdings' “mission statement” objective²⁸ to produce a surplus to EquitasRe-reinsured SYA participants, nor on “reducing uncertainty relating to insurance assets and liabilities by the creative use of actuarial and financial techniques”,²⁹ but on Equitas Holdings' finance director's apprehension of Equitas Re's insolvency despite those techniques: “The principal risk to the Group remains that it may not be able to settle its liabilities in full”,³⁰ — *cf.* apparently contrary indications elsewhere in the same RA.³¹ Though Equitas Re will probably

¹⁸ *Viz.*, the Trustee receives relevant written notice that the “Lloyd's market” has ceased trading (see Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.1(a); Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.1(a)) or (in essence — for full provisions, see Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.1(b); Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.1(b)) after the elapsing of sixty days from a date of a relevant valuation of the trust fund — the “as at” date is not specified — on which the trust assets fell, or after paying a Matured Claim would fall, below the Trust Fund Minimum Amount (see Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.1(b); Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.1(b)). *Cf.* LATD, Old Central Fund Byelaw, and New Central Fund Byelaw, which do not use the term

¹⁹ See generally RRC 4, Sch. 3.

²⁰ See generally RRC 5, Sch. 3.

²¹ See EATD, §12(a)(4); see also *ibid.*, §12(a)(2).

²² Incidents of Equitas Re undergoing an English insolvency process are capable of including (for example) clarification and resolution of, and the detailed accounting required to establish, outstanding claims against individual EquitasRe-reinsured SYA participants; clarification of Equitas Re's relevance to EquitasRe-assureds-at-Lloyd's in the first place; the EquitasRe-assureds-at-Lloyd's formal recourse to the Lloyd's enterprise (if he has not already granted relevant releases); Members' responsibility and liability to furnish common-use funds; the Lloyd's enterprise's possible insolvency in default of those funds; the establishing of relevant classes of creditor assured-at-Lloyd's; uniformity of claims settlement technique; uniformity of pay-out; and hence a degree of predictability.

²³ Scott Moser, Equitas Re claims director, American Bar Association

²⁴ See RRC 4, Sch. 3, §3.1 *et seq.*

²⁵ See p.84.

²⁶ See p.85.

²⁷ See p.85.

²⁸ See p.45.

²⁹ *Reducing uncertainty — reserving issues in the 21st century — Equitas — managing long-tailed risks, May 12, 2000*, Paul Jardine, Commutations Director & Chief Actuary, Equitas Limited, 4th unnumbered slide “Background to Equitas and its financial position”.

³⁰ Equitas Holdings RA fye March 31, 2002, p.21 (Financial review; June 18, 2002). And see likewise for example Equitas Holdings RA fye March 31, 2001, p.15 (Financial review; July 17, 2001); Equitas Holdings RA fye March 31, 2000, p.15 (Financial review; July 18, 2000). The finance director specifically means EquitasRe-reinsurance liabilities. *Cf.* for example Equitas Re's first filed accounts: as at March 19, 1997, Equitas Re directors apparently did not believe that its assets were not sufficient to meet all its liabilities in full: Equitas Re RA 1996, p.16 (notes to the financial statements for the period ended 4 September 1996) and *ibid.*, p.7. And *cf.* Equitas Holdings RA fye March 31, 2002, p.41 (Notes to the financial statements):-

Going concern — Significant uncertainties exist as to the accuracy of the provision for claims outstanding established by Equitas Limited and recoveries due from reinsurers shown in the balance sheet, further details of which are set out in note 2 on page 43. The ultimate cost of claims and the amounts ultimately recovered from reinsurers could vary materially from the amounts established and could, therefore, have a materially adverse effect on the ability of Equitas Limited to meet the reinsured liabilities in full. If at any time the Directors of Equitas Reinsurance Limited believe that the reinsured liabilities cannot be met in full, they may consider implementing a proportionate cover plan. At the date of this report, the Directors believe that the assets should be sufficient to meet all liabilities in full.

³¹ Equitas Holdings RA fye March 31, 2002, p.41 (“Going concern”):-

not run out of money unexpectedly³² or suddenly,³³ its future appears uncertain,³⁴ and to that extent the future — increasingly³⁵ in the hands of corporate Members — of the Lloyd's enterprise.

EQUITAS RE'S COUNTERPARTIES

Equitas Re's debtors

- 4.4 Equitas Re's principal debtors include: (1) Equitas Ltd. under RRC 5, §2; (2) EquitasRe-reinsured SYA participants' outward reinsurers³⁶ (some of whom are the outwardly-reinsured and or other EquitasRe-reinsured SYA participants): each EquitasRe-reinsured SYA participant has assigned³⁷ (indirectly³⁸) to Equitas Re his right, title and interest in the proceeds (whether or not accrued) of relevant outward reinsurance. Equitas Re and Equitas Ltd. each bear personally the risk of not collecting that reinsurance;³⁹ (3) the Corporation under various express contractual indemnities relating to Centrowrite and Lioncover.⁴⁰

Equitas Re's creditors

the EquitasRe-reinsured SYA participant

- 4.5 Each EquitasRe-reinsured SYA participant is Equitas Re's notional creditor to the extent (assuming it can be ascertained) of all his EquitasRe-reinsured liabilities (assuming they can be ascertained). But he has assigned⁴¹ all his recovery rights against Equitas Re to Equitas Policyholders Trustee and thus receives assigned property, if ever, only in accordance with the assignment: (1) short of a RRC 7, §2.15 Insolvency Event — at which point Equitas Policyholders Trustee is required⁴² to intervene, including to appropriate Equitas Re's relevant assets — he is expressly prohibited⁴³ from ordinarily being an actual payee of Equitas Re. He eventually (if ever) is an actual payee⁴⁴ of Equitas Re (for example) after the latter has paid its RRC 4 "General Creditors" in full⁴⁵ and then distributed the balance so far as required to RRC 4 "Insurance

Significant uncertainties exist as to the accuracy of the provision for claims outstanding established by Equitas Limited and recoveries due from reinsurers shown in the balance sheet, further details of which are set out in note 2 on page 43. The ultimate cost of claims and the amounts ultimately recovered from reinsurers could vary materially from the amounts established and could, therefore, have a materially adverse effect on the ability of Equitas Limited to meet the reinsured liabilities in full. If at any time the Directors of Equitas Reinsurance Limited believe that the reinsured liabilities cannot be met in full, they may consider implementing a proportionate cover plan. At the date of this report, the Directors believe that the assets should be sufficient to meet all liabilities in full.

32 See S&M, §50(a) (p.17).

33 See S&M, §50(b) (p.17).

34 See for example *Lloyd's: Re-establishing the Franchise, Managing the Risks* (Moody's Investors Service, October 1997), p.5:-

The scope of the market's restructuring was truly ambitious "[G]ood bank/bad bank" solutions are always difficult, involving tough choices, compromises, and difficult-to-predict outcomes; this one is no different. The brief experience of Equitas to-date has been good, but experience with other run-offs, especially those involving the settlement of long-tail liabilities, suggests a cautious outlook.

35 Corporate SYA participants consume the most PIL.

36 See for example RRC 4, §§6.1 and 6.4.

37 See RRC 4, §6.1 *et seq.*

38 See RRC 4, §§6.1 and 6.4.

39 See RRC 4, §3.2; RRC 5, §2.3.

40 See p.139.

41 At RRC 4, §4.1 *et seq.*

42 See RRC 7, §2.4 *etc.*

43 At RRC 4, §9.4(c). Following a RRC 7, §2.15 Insolvent Event, Equitas Policyholders Trustee pays the EquitasRe-reinsured SYA participant after paying

44 See RRC 4, §9.4(c) and the other RRC 4 provisions there mentioned.

45 See RRC 4, Sch. 3, §12 read with *ibid.*, §13; see similarly RRC 5, Sch. 3, §12.

Creditors";⁴⁶ (2) when a RRC 7, §2.15 Insolvency Event does occur, he is then entitled to receive from Equitas Policyholders Trustee reimbursement if (an almost impossible event) he has already personally paid an EquitasRe-assured-at-Lloyd's from his own personal assets;⁴⁷ and his due proportion of any surplus,⁴⁸ after required prior payments.⁴⁹

Equitas Policyholders Trustee as surrogate-assignee

- 4.6 When a RRC 7, §2.15 "Insolvency Event" does occur, Equitas Re's principal creditor becomes Equitas Policyholders Trustee⁵⁰ (wholly owned⁵¹ by Equitas Holdings) as each EquitasRe-reinsured SYA participant's assignee⁵² of relevant RRC 4, §3-related rights, Equitas Policyholders Trustee holding those rights — RRC 4, §4 "Assigned Property" (in RRC 7⁵³ called "Trust Property") — under RRC 7 on trust for (among others⁵⁴) Insurance Creditors,⁵⁵ viz., the general-ity of unpaid EquitasRe-assureds-at-Lloyd's.

"General Creditors"

- 4.7 Equitas Re has one type of "General Creditor", of which RRC 4 has one definition⁵⁶ (which expressly excludes every EquitasRe-reinsured participant) and RRC 5 has another⁵⁷ (which does not). Both RRC 4, Sch. 3⁵⁸ and RRC 5, Sch. 3⁵⁹ require Equitas Re and Equitas Ltd. to pay their own General Creditors in full before paying (among others) any EquitasRe-reinsured SYA participant. Equitas Policyholders Trustee has similar priorities.⁶⁰ Equitas Re's assets to pay Insurance Creditors are its assets as at the "Record Date"⁶¹ less whatever it needs to pay General Creditors.⁶²

"Insurance Creditors"

- 4.8 Notwithstanding RRC 4's insistence that the RRC 4, §3 product is mere reinsurance and its express⁶³ exclusion of every EquitasRe-assured-at-Lloyd's as a third-party beneficiary of Equitas Re's *ibid.*, §3 reinsurance obligations, RRCs 4,⁶⁴ 5⁶⁵ and 7⁶⁶ provide that every EquitasRe-assured-at-Lloyd's is an "Insurance Creditor" — in relation to Equitas Re, Equitas Ltd. and Equitas Policyholders Trustee respectively (the munificence is, in principle, implicitly without prejudice to his recourse rights against relevant funds at the Lloyd's enterprise in the ordinary way; the EquitasRe-assured-at-Lloyd's is under no contractual or other legal obligation to treat with Equitas Re, Equitas Ltd. or Equitas Policyholders Trustee in any way on any matter):-

⁴⁶ See generally for example RRC 4, §3.4.

⁴⁷ See RRC 7, §2.7(c).

⁴⁸ See RRC 7, §2.7(d).

⁴⁹ See generally RRC 7, §2.7(a), (b) and (c).

⁵⁰ See generally RRC 7.

⁵¹ See p.41.

⁵² See RRC 4, §4.

⁵³ See RRC 7, §1.1.

⁵⁴ See RRC 7, §2.1 *et seq.*

⁵⁵ See RRC 7, §2.2 *et seq.*

⁵⁶ See at RRC 4, Sch. 2, §1.

⁵⁷ See at RRC 5, Sch. 3, §17.

⁵⁸ RRC 4, Sch. 3, §12.

⁵⁹ RRC 5, Sch. 3, §12.

⁶⁰ See RRC 7, §2.7(a).

⁶¹ Defined at RRC 4, Sch. 2, §1.

⁶² RRC 4, Sch. 2, §1 definition of "Available Assets".

⁶³ RRC 4, §3.7. See similarly RRC 5, §2.6.

⁶⁴ See RRC 4, Sch. 2, §1 definition of "Insurance Creditor".

⁶⁵ See RRC 5, Sch. 1, §1 first sentence.

⁶⁶ See RRC 7, §1.1, definition of "Insurance Creditor".

Equitas Re's insolvency: relevant bodies, instruments and events

who / what	ordinarily	Insolvency Act 1986, s.123 inability to pay debts	Proportionate Cover	other insolvency process	Lloyd's enterprise ceases to trade
Central Fund	(1) no express float fund function; (2) express <i>prohibition</i> on the Council's use (the Council has deprived itself even of discretion); (3) EquitasRe-assured-at-Lloyd's can argue availability as of right				
Corporation's (other) personal assets	(1) the Council is statutorily expressly <i>empowered</i> to use the Corporation's personal funds: Lloyd's Act 1982, s.7(b), (c), (d); (2) EquitasRe-assured-at-Lloyd's can argue availability: (a) as of right; (b) as a matter of discretion				
EquitasRe-reinsured SYA participant	in practice totally irrelevant				
Equitas Re	does nothing	ordinarily, this would be a ground to wind up the company	insolvency reprieve	-	no express provisions
Equitas Ltd.	pays Equitas Re's RRC 4, §3 debts: see RRC 5, §2.3		insolvency reprieve	-	
Equitas Policyholders Trustee	(1) RRC 7, §2.2 collection and distribution function (2) RRC 7, §2.3 distribution function	no express mention	RRC 7, §2.15(d)	(1) RRC 7, §2.4: proves in Equitas Re's insolvency as assignee of EquitasRe-reinsured SYA participants on trust for EquitasRe-assureds-at-Lloyd's	
EquitasRe-reinsurance Trustees	owner of entire Equitas enterprise but policy of no involvement	no express mention	no specific role	no specific role	

EATD	source fund for relevant LATFs	seizure by NYID <i>per</i> §12(a)(2) unless Equitas Re can pay its debts as adjusted by Proportionate Cover	seizure by NYID if either: - (1) Equitas Re unable to pay its debts as adjusted by Proportionate Cover: §12(a)(2) (2) (a) proportionate cover; and (b) the rate on EATD American Business is less than 100%; and (c) the claim qualifies under LATD, §5.2; and (d) the claim has not been paid within 120 days of the LATD, §5.2D period	seizure by NYID: - (1) §12(a)(1) (winding up or provisional liquidation) (2) §12(a)(3) (administrator, administrative receiver; manager, receiver, trustee; similar officer is appointed; administration order)	no express provisions
LATD	disbursement fund for relevant claims	no express mention	seizure by NYID: §18.1(b): (1) proportionate cover; and (2) the rate on LATD American business is less than 100%; and (3) the claim qualifies under LATD, §5.2; and (4) the claim has not been paid within 120 days of the LATD, §5.2D period	not specifically mentioned	seizure by NYID: §18.1(a)
Lloyd's US SL CU TD	Equitas Re not mentioned in either deed: Equitas Re's insolvency etc. does not affect the availability of either fund				
Lloyd's US CR CU TD					

(1) Equitas Re generally: Equitas Re has two types of Insurance Creditor, “Actual Insurance Creditor”, viz., an Insurance Creditor in respect of whom any Claim is outstanding,⁶⁷ and “Contingent Insurance Creditor”, an Insurance Creditor in respect of whom a liability has been incurred but not reported.⁶⁸ RRC 4 envisages Contingent Insurance Creditors being paid in full.⁶⁹ An EquitasRe-reinsured SYA participant's liability to an Insurance Creditor is a RRC 4 “Secured Obligation”.⁷⁰ Presumably an EquitasRe-assured-at-Lloyd's seeking to prove in Equitas Re's insolvency directly (*cf.* through Equitas Policyholders Trustee⁷¹) should take care to avoid any implication of waiver of his claim against an EquitasRe-reinsured SYA participant and thus of his recourse to relevant common-use funds at the Lloyd's enterprise;

(2) Proportionate Cover at Equitas Re: if Equitas Re implements a sustainable⁷² RRC 4, Sch. 3 Proportionate Cover Plan, every EquitasRe-assured-at-Lloyd's is similarly an “Insurance Creditor”.⁷³ On the occurrence of a Certified Reinsurance Trigger Event, Equitas Re's board is entitled to “consult” with him or his “representative” in connection with setting a RRC 4, Sch. 3, §6 Proportionate Cover Rate, suspending payments, or such other matters as Equitas Re's board may determine in its sole discretion;⁷⁴

(3) Equitas Policyholders Trustee: If Equitas Re has sustained a RRC 7, §2.15 Insolvency Event, he is an “Insurance Creditor” in relation to Equitas Policyholders Trustee.⁷⁵ Equitas Policyholders Trustee is empowered⁷⁶ to appropriate to the general fund a claims payment designated by Equitas Re for a particular Insurance Creditor. Equitas Policyholders Trustee also has various functions for the benefit of the relevant Insurance Creditor in relation to a relevant failure by a solvent⁷⁷ Equitas Re: if Equitas Re conducts itself in a solvent fashion, RRC 4 expressly⁷⁸ provides that the Insurance Creditor is a potential direct payee.

position of EquitasRe-reinsured SYA participants

- 4.9 In RRC 4, the mere EquitasRe-reinsured SYA participant is called a “Reinsured Party”.⁷⁹ He is neither a RRC 4-defined “Insurance Creditor” nor a RRC 4- or RRC 5⁸⁰-defined “General Creditor”.⁸¹ During an insolvency process of its own, Equitas Re need not concern itself with any EquitasRe-reinsured SYA participant as an active creditor, for each has already assigned⁸² relevant rights and recoveries to Equitas Policyholders Trustee, which acts as his compulsory proxy in any relevant insolvency process.

⁶⁷ RRC 4, Sch. 2, §1 definition of “Actual Insurance Creditor”.

⁶⁸ RRC 4, Sch. 2, §1 definition of “Contingent Insurance Creditor”.

⁶⁹ See RRC 4, Sch. 3, §13.2(c)-(d).

⁷⁰ See RRC 4, Sch. 2, §1 definition of “Secured Obligation”.

⁷¹ See RRC 7, §2.4 *et seq.*

⁷² See RRC 7, §2.15(c)(i).

⁷³ See the detailed RRC 4, Sch. 2, §1 definition of “Insurance Creditor”.

⁷⁴ RRC 4, Sch. 3, §2.4.

⁷⁵ See generally RRC 7, §1.1 (definition of “Insurance Creditor”) and *ibid.*, §2.7(b).

⁷⁶ See RRC 4, §4.10; RRC 7, §2.4.

⁷⁷ See RRC 7, §2.2.

⁷⁸ See generally RRC 4, §3.4(e).

⁷⁹ See RRC 4, Sch. 2, §1 definition of “Reinsured Parties”.

⁸⁰ See RRC 5, Sch. 1, §1, a materially different, manifestly erroneous definition. The purpose of the error is not clear.

⁸¹ See p.220.

⁸² See generally RRC 4, §4.

EQUITAS POLICYHOLDERS TRUSTEE

role other than in an “Insolvency Event”

- 4.10** Equitas Policyholders Trustee has various functions in relation to a solvent Equitas Re, *viz.*, principally, to seek to cure Equitas Re’s failure, “notified by any Reinsured Name or the Substitute Agent”,⁸³ to discharge its obligation to the relevant EquitasRe-reinsured SYA participant and or Equitas Policyholders Trustee to make any payment to an EquitasRe-assured-at-Lloyd’s in accordance with the RRC 4, §3.⁸⁴ The EquitasRe-assured-at-Lloyd’s is under no contractual or other legal obligation to treat with Equitas Policyholders Trustee in any way on any matter.

role following an “Insolvency Event”

RRC 7, §2.15 “Insolvency Event”

- 4.11** Any of the following constitutes a RRC 7, §2.15 Insolvency Event, *viz.*:-

(1) Equitas Re’s failure to comply within seven days with a final judgment that it make any RRC 4 payment.⁸⁵

(2) an order is made by any competent court, or a resolution is passed, for Equitas Re’s winding-up or for the appointment of a liquidator or provisional liquidator of Equitas Re.⁸⁶ Any of those three circumstances happens also to be a RRC 4, Sch. 3, §2.3 Automatic Reinsurance Trigger Event, on the occurrence of which Equitas Re is required⁸⁷ to adjust its liabilities by applying a Proportionate Cover Rate.⁸⁸ The effect seems to be (the drafting is not clear) that the adjusted liabilities become to some extent⁸⁹ binding on Equitas Re’s liquidator or provisional liquidator as at the adjustment’s effective date⁹⁰ — and also⁹¹ on Equitas Policyholders Trustee when the latter seeks to prove in the liquidation — and Equitas Re does *not* implement a Proportionate Cover Plan (the definition of which appears to be defective⁹²);

(3) Equitas Re is unable or deemed unable to pay its actually or potentially adjusted debts within the meaning of Insolvency Act 1986, s.123,⁹³ or suspends or threatens to suspend making payments (whether of principal or interest) with respect to all of its debts or debts of any particular class⁹⁴ — in determining if Equitas Re is unable to pay its debts, Equitas Policyholders Trustee is required to take into account the extent to which any debt which Equitas Re would otherwise be obliged to pay in full “can” be paid at less than that amount further to RRC 4, Sch. 3, §9⁹⁵ or under any actual⁹⁶ or potential⁹⁷ Proportionate Cover Plan. The provision suggests (the drafting is not clear) that an altogether different process applies at Equitas Re in the event of a Certified (as distinct from an Automatic) Reinsurance Trigger Event, *viz.*, the event occurs;⁹⁸ Equitas Re

⁸³ RRC 7, §2.2.

⁸⁴ See RRC 4, §2.2; *q.v.* for full provisions.

⁸⁵ RRC 7, §2.15(a).

⁸⁶ RRC 7, §2.15(b).

⁸⁷ See RRC 4, Sch. 3, §3.1.

⁸⁸ See RRC 4, Sch. 2, §1 definition of “Proportionate Cover Rate”; *ibid.*, Sch. 3, §3.1 *et seq.*

⁸⁹ The liquidator or provisional liquidator is contractually permitted to recalculate the liabilities: see RRC 4, Sch. 3, §10.1.

⁹⁰ See RRC 4, Sch. 3, §3.3.

⁹¹ See RRC 4, Sch. 3, §10.1.

⁹² See the RRC 4, Sch. 2, §1 definition.

⁹³ RRC 7, §2.15(c)(i) (actually adjusted) and (ii) (potentially).

⁹⁴ RRC 7, §2.15(c).

⁹⁵ RRC 7, §2.15(c)(iii).

⁹⁶ RRC 7, §2.15(c)(i).

⁹⁷ RRC 7, §2.15(c)(ii).

⁹⁸ See RRC 4, Sch. 3, §2.1.

adjusts its liabilities,⁹⁹ the adjustment takes effect;¹⁰⁰ Equitas Re then “implements” a Proportionate Cover Plan.¹⁰¹ The plan can be effective in forestalling a RRC 7, §2.15(c) Insolvency Event;

(4) an administrator, administrative receiver or manager, receiver, trustee or similar officer is appointed, or an administration order is made, with respect to Equitas Re or all or a substantial part of its assets.¹⁰²

functions summarised

4.12 Equitas Policyholders Trustee is the (secured¹⁰³) sole assignee¹⁰⁴ of each EquitasRe-reinsured SYA participant’s relevant rights against Equitas Re in respect only of the latter’s RRC 4, §3 functions, not its *ibid.*, §9 functions. As assignee to that extent, Equitas Re having sustained a RRC 7, §2.15 “Insolvency Event” — being part of the Equitas group, Equitas Policyholders Trustee is well placed to anticipate and react immediately — Equitas Policyholders Trustee has three principal functions:-¹⁰⁵

(1) in relation to a payment of an approved claim which Equitas Re was on the point of making from its personal funds¹⁰⁶ to a particular EquitasRe-assured-at-Lloyd’s,¹⁰⁷ Equitas Policyholders Trustee is empowered¹⁰⁸ ¹⁰⁹ to serve a notice on Equitas Re appropriating that payment to itself.¹¹⁰ The putative payee claimant loses the payment as such;¹¹¹

(2) to¹¹² take whatever steps it deems necessary to marshall¹¹³ and protect¹¹⁴ other RRC 7, §1.1 Trust Property,¹¹⁵ including to petition to wind up Equitas Re.¹¹⁶ Equitas Policyholders Trustee would also exercise, in the appropriate manner, its rights under RRC 4, §4.1(a).¹¹⁷ In trying to extract assets from Equitas Re in the course of an insolvency process, Equitas Policyholders Trustee is required to establish the amount owing by Equitas Re under the terms of the Reinsurance Contract and the relevant amount due to each Insurance Creditor.¹¹⁸ Equitas Policyholders Trustee is entitled to assume, absent other satisfactory evidence from an Insurance Creditor personally, the accuracy of figures provided by a liquidator, administrator, supervisor or further to a Companies Act 1985, s.425 scheme of arrangement enabling Equitas Policyholders Trustee to

⁹⁹ See RRC 4, Sch. 3, §3.1.

¹⁰⁰ See RRC 4, Sch. 3, §3.2.

¹⁰¹ See RRC 4, Sch. 3, §5.1.

¹⁰² RRC 7, 2.15(d).

¹⁰³ RRC 4, §4.3; and see Equitas Re’s acknowledgment at *ibid.*, §4.5. The security is a continuing one: *ibid.*, §4.9.

¹⁰⁴ See RRC 4, §4.3.

¹⁰⁵ *Viz.*, solely (RRC 7, §2.12) per RRC 7, §§2.4 to 2.11 *et seq.*

¹⁰⁶ RRC 4, §4.10 read with *ibid.*, §§3.4 and 4.2.

¹⁰⁷ RRC 7, §2.4.

¹⁰⁸ See RRC 4, §4.10; and see *ibid.*, §3.4; RRC 7, §2.4.

¹⁰⁹ See RRC 4, §4.10.

¹¹⁰ RRC 7, §2.4.

¹¹¹ RRC 7, §2.5. He loses it altogether to the extent Equitas Policyholders Trustee makes no *ibid.*, §2.7(b) payment to him.

¹¹² See RRC 7, §2.4.

¹¹³ See RRC 7, §2.4.

¹¹⁴ See RRC 7, §2.4.

¹¹⁵ *Viz.*, as defined in RRC 7, §1.1; identical to the “Assigned Property” defined in RRC 4, §4.1.

¹¹⁶ RRC 7, §2.4.

¹¹⁷ In doing so Equitas Policyholders Trustee would be in a position equivalent to that of SYA participants in *New Cap Reinsurance Corporation Ltd. v HIH Casualty & General Insurance Ltd.* (CA, February 20, 2002; unreported), §14 (Jonathan Parker LJ).

¹¹⁸ RRC 7, §2.6.

calculate that amount.¹¹⁹ Notwithstanding its functions and powers in relation to extracting Trust Property from Equitas Re, Equitas Policyholders Trustee is required¹²⁰ not to seek to prevent RRC 4, §8 return premium unless of the opinion that Equitas Re would thereafter be unable or deemed unable to pay its debts within the meaning of Insolvency Act 1986, s.123 and on the assumption that Equitas Re has no power to introduce a Proportionate Cover Plan;

(3) to distribute, in accordance with RRC 7, §2.7, such of Equitas Re’s money as it has been able to marshall.

distribution of RRC 7 “Trust Property”

4.13 Equitas Policyholders Trustee is required¹²¹ to distribute whatever RRC 7, §1.1 Trust Property it happens to have been able to extract from Equitas Re — subject to being fully indemnified¹²² and net¹²³ of all relevant expenses. Equitas Policyholders Trustee — in the following order of priority:-

(1) first, to pay itself its own due remuneration and any other RRC 7 costs, charges, liabilities and expenses;¹²⁴

(2) secondly, to pay Secured Obligations owing, actually, prospectively or contingently, to each Insurance Creditor or his assignee proportionately, as determined by Equitas Policyholders Trustee itself.¹²⁵ The EquitasRe-assured-at-Lloyd’s is expressly not a third-party beneficiary of RRC 4¹²⁶ or RRC 5;¹²⁷ but RRC 7, §2.7(b) is to the opposite effect. Though the EquitasRe-assured-at-Lloyd’s appears to have no obligation to become involved in Equitas Re’s insolvency — whether directly or through Equitas Policyholders Trustee — there appears to be no reason in principle why he should not accept a partial payment from Equitas Policyholders Trustee without prejudice to his right to recourse for the full amount to relevant common-use funds at the Lloyd’s enterprise. Equitas Policyholders Trustee is entitled to assume that the Insurance Creditor has not already been paid direct by any EquitasRe-reinsured SYA participant.¹²⁸ The payout, which is subject to Equitas Policyholders Trustee receiving (if it so wishes) the putative recipient Insurance Creditor’s written confirmation that he will apply such sums to reduce or extinguish amounts owed to him under “the” EquitasRe-reinsured insurance,¹²⁹ is particularly downsized if Equitas Re is already implementing a Proportionate Cover Plan,¹³⁰

(3) thirdly, to reimburse any EquitasRe-reinsured SYA participant who had made any payment to an Insurance Creditor before Equitas Policyholders Trustee did so (including any payment made by way of set-off), fully if funds permit, otherwise proportionately.¹³¹ It is for the EquitasRe-

¹¹⁹ RRC 7, §2.6.

¹²⁰ RRC 7, §2.17.

¹²¹ See RRC 7, §2.5 *et seq.*

¹²² See RRC 7, §2.14; and see generally *ibid.*, §7.3.

¹²³ See RRC 7, §2.7(a).

¹²⁴ RRC 7, §2.7(a). A separate point: Equitas Policyholders Trustee’s own creditors are RRC 5, Sch. 1, §1-defined “General Creditors” whom Equitas Ltd. is required to pay in full: *ibid.*, Sch. 3, §12.

¹²⁵ RRC 7, §2.7(b) and see *ibid.*, §2.16. “Any determination of the persons entitled to any sums received by the Trustee in respect of the Trust Property shall be conclusive”: *ibid.*, §2.16. “Pending such determination, the Trustee shall be entitled to invest such sums in Authorised Investments and to accumulate any income arising thereon”: *ibid.*

¹²⁶ See RRC 4, §3.7.

¹²⁷ See RRC 5, §2.6.

¹²⁸ RRC 7, §2.9.

¹²⁹ RRC 7, §2.11.

¹³⁰ See RRC 7, §2.10.

¹³¹ RRC 7, §2.7(c).

reinsured SYA participant to provide evidence to Equitas Policyholders Trustee that he has made such a payment;¹³²

(4) fourthly, to distribute any remnants proportionately to each EquitasRe-reinsured SYA participant according to the value of the Trust Property *originally* assigned to Equitas Re under RRC 4, §4.1.¹³³

If Equitas Policyholders Trustee receives any sum in the nature of Trust Property and is unable to determine how it should be distributed under RRC 7 or is “aware” of any dispute or proceeding by any person in respect of his entitlement under RRC 7 or in respect of Equitas Policyholders Trustee’s determination of such entitlement, it is empowered¹³⁴ to withhold distribution until satisfied how it should be distributed.

Equitas Policyholders Trustee protected

- 4.14** If Equitas Policyholders Trustee complies with its RRC 7, §2.7 *et seq.* distribution obligations, no Insurance Creditor, EquitasRe-reinsured SYA participant or AUA 9 is entitled to make any claim against it in relation to the distribution.¹³⁵ In particular, absent Equitas Policyholders Trustee’s wilful default in making such determination, no Insurance Creditor, EquitasRe-reinsured SYA participant or AUA 9 is entitled to make any claim against Equitas Policyholders Trustee in relation to a distribution under RRC 7, §2.16.¹³⁶ Equitas Policyholders Trustee additionally benefits from express indemnities.¹³⁷

effect of proportionate cover at Equitas Re on RRC 7, §2.15 “Insolvency”

- 4.15** The notion that Equitas Re cannot become insolvent because it is contractually empowered to artificially reduce its original liabilities to zero, however pernicious, does have contractual importance. For example, a feasible¹³⁸ proportionate cover plan has the effect of enabling Equitas Re to escape for RRC 7, §2.15 purposes one definition of “Insolvency Event”, *viz.*, an Insolvency Act 1986, s.123 inability to pay its *unadjusted* debts.¹³⁹ If Equitas Re decides to implement a feasible proportionate cover plan and in the (presumably unlikely) event that no other RRC 7, §2.15 Insolvency Event occurs, Equitas Policyholders Trustee’s *ibid.*, §2.4 marshalling and protection obligations do not arise, and Equitas Re appears to be able (all other things being equal) to pay out without hindrance.

Equitas Policyholders Trustee’s role

- 4.16** If Equitas Re does implement a proportionate cover plan before a RRC 7, §2.15 “Insolvency Event”, the Trust Property that Equitas Policyholders Trustee is entitled to marshal and protect under *ibid.*, §2.4, and that it is required to distribute under *ibid.*, §2.7, appears to be whatever relevant adjusted amount emerges from such plan.¹⁴⁰ The degree to which such recalibration is binding in a conventional insolvency process to which Equitas Re may subsequently be subject is not clearly expressed in RRC 4.¹⁴¹

¹³² RRC 7, §2.9. Such payment is highly improbable because of Equitas Re’s RRC 4, §9 exclusive run-off agency.

¹³³ RRC 7, §2.7(d).

¹³⁴ RRC 7, §2.16; q.v. for full provisions.

¹³⁵ RRC 7, §2.8.

¹³⁶ RRC 7, §2.16.

¹³⁷ See RRC 7, §§2.7(a), 2.14, and (generally) 7.3.

¹³⁸ See arguably RRC 7, 2.15(c) (“can be paid”).

¹³⁹ See RRC 7, §2.15(c)(i) and (ii).

¹⁴⁰ See RRC 7, §2.10.

¹⁴¹ The interaction between RRC 4, Sch. 3, §§3 and 5 is particularly unclear; *ditto* RRC 5, Sch. 3, §§3 and 5.

insolvency processes: where mentioned in RRCs 4, 5, 7, 17

insolvency process	where mentioned in RRCs 4, 5, 7, 17
receivership	RRC 4: none relevant ("Receiver" is used at RRC 4, Sch. 2, §2(f)(iii)) RRC 5: - RRC 7: §2.15(d) RRC 17: -
administration / administrative receivership	RRC 4: none relevant ("Receiver" is used at RRC 7, §1.2(g)(iii)) RRC 5: - RRC 7: §2.15(d) ("Administrator" and "administrative receiver" are also used at RRC 7, §1.2(g)(iii)) RRC 17: -
corporate voluntary arrangement	RRC 4, §4.1(a)(ii); Sch. 3, §8.1(a) RRC 5, Sch. 3, §8.1(a) RRC 7: recital (B)(ii); §2.5 RRC 17: §8.1(m)
corporate pre-voluntary arrangement	<i>post-dates RRCs 4 and 5</i>
provisional liquidation	RRC 4, Sch. 3, §2.3(c), 3.3(iii), 8.1 RRC 5, §§2.3(c), 3.3(iii), 8.1 RRC 7, §2.15(b) RRC 17: -
liquidation	RRC 4, Sch. 3, §10.1 heading, 10.1, 10.2, 12 (also at RRC 4, Sch. 2, §2(f)(iii)) RRC 5, Sch. 3, §§10.1 heading, 10.1, 10.2, 12 RRC 7, §2.6, 2.7(b), (d), 2.10, 2.15(b) (also at RRC 7, §1.2(g)(iii)) RRC 17: -
scheme of arrangement	RRC 4, §4.1(a)(ii); Sch. 2, §1 definition "Orion/L&O Reinsurances"; Sch. 3, §8.1(a), 11 heading, 11, 12 RRC 5, Sch. 3, §8.1(a); 11 heading; 11, 12 RRC 7, recital (B)(a)(ii); §§2.5, 2.6 RRC 17, §8.1(m)

Sub-chapter 2: some insolvency processes and precipitates

ADMINISTRATION

- 4.17** RRC 7, §2.15 Insolvency Events include the making of an administration order in relation to Equitas Re.¹⁴² Administration¹⁴³ is intended to assist a company not¹⁴⁴ yet in liquidation, which is¹⁴⁵ or may become¹⁴⁶ insolvent,¹⁴⁷ to either attempt to proceed as a going concern,¹⁴⁸ undergo a CVA,¹⁴⁹ or to adopt a Companies Act 1985, s.425 scheme of arrangement.¹⁵⁰ Once the court has made an administration order, it must dismiss a petition to liquidate the company.¹⁵¹ Previously expressly¹⁵² not available for an “insurance company” as defined in (now repealed) Insurance Companies Act 1982, it is likely to become available shortly, in modified form, to insurance companies.¹⁵³

COMPANY VOLUNTARY ARRANGEMENT

orientation

- 4.18** An Insolvency Act 1986, Part I company voluntary arrangement¹⁵⁴ is generally inappropriate to the extent that the insolvent insurance company’s every policyholder cannot readily be identified, likely to be the case at Equitas Re. RRC 4, §4.1 “Assigned Property” includes each Equitas Re-reinsured SYA participant’s rights against Equitas Re pursuant to a CVA.¹⁵⁵

some RRC provisions

proposing a CVA

- 4.19** If Equitas Ltd.’s board considers that they are unable, for whatever reason, to make any determination required for the purposes of RRC 5, Sch. 3, §5 and 6, Equitas Ltd. then becomes entitled to take action with a view to promoting a CVA.¹⁵⁶ If Equitas Ltd. notifies it that Equitas Ltd. is to take any action with a view to promoting a CVA, Equitas Re may take such action.¹⁵⁷

payouts

- 4.20** Equitas Re’s right to receive any payment from Equitas Ltd. under RRC 5, Sch. 3 is subordinated to (among other things) paying or providing for the paying in full of CVA expenses.¹⁵⁸ Eq-

¹⁴² See RRC 7, §2.15(d).

¹⁴³ See generally Insolvency Act 1986, Part II (ss.8-27), especially *ibid.*, s.13 *et seq.* Note the exclusion of insurance companies at *ibid.*, s.8(4)(a); Insolvency Rules 1986 (1986 SI 1925), Part 2.

¹⁴⁴ Insolvency Act 1986, s.8(4)(a).

¹⁴⁵ Insolvency Act 1986, s.8(1)(a).

¹⁴⁶ Insolvency Act 1986, s.8(1)(a).

¹⁴⁷ *Viz.*, within the meaning of Insolvency Act 1986, s.123: *ibid.*, s.8(1)(a).

¹⁴⁸ Insolvency Act 1986, s.8(3)(a).

¹⁴⁹ Insolvency Act 1986, s.8(3)(b).

¹⁵⁰ Insolvency Act 1986, s.8(3)(c).

¹⁵¹ Insolvency Act 1986, s.11(1)(a).

¹⁵² See Insolvency Act 1986, s.8(4)(a).

¹⁵³ See Financial Services and Markets Act 2000, s.360.

¹⁵⁴ The closely related moratorium procedure introduced by Insolvency Act 2000 post-dates the RRCs.

¹⁵⁵ RRC 4, §4.1(a)(ii); and see RRC 7, recital (B)(a)(ii).

¹⁵⁶ RRC 5, Sch. 3, §8.1(a)

¹⁵⁷ RRC 4, Sch. 3, §8.1(a).

¹⁵⁸ RRC 5, Sch. 3, §12.

uitas Policyholders Trustee is empowered to receive RRC 7, §1.1 Trust Property pursuant to a CVA made between Equitas Re and its creditors, must distribute that property to Insurance Creditors in accordance with RRC 7, §2.7,¹⁵⁹ and is in doing so entitled to assume the accuracy of calculations produced in the course of that arrangement in relation to an EquitasRe-reinsured SYA participant's relevant liability to an EquitasRe-assured-at-Lloyd's.¹⁶⁰ The EquitasRe-reinsurance Trustees are empowered¹⁶¹ to consent to any CVA made in relation to Equitas Re as they in their absolute discretion think fit.

LIQUIDATION

orientation

- 4.21** One of the few provisions in Insurers (Winding Up) Rules 2001¹⁶² relevant to Equitas Re and Equitas Ltd. is *ibid.*, Rule 6 and *ibid.*, Sch. 1, §1 (Rules for valuing general business policies).¹⁶³ Various RRCs and elsewhere¹⁶⁴ (including their respective Articles of Association¹⁶⁵) deal ex-

¹⁵⁹ RRC 7, §2.5.

¹⁶⁰ RRC 7, §2.6.

¹⁶¹ RRC 17, §8.1(m).

¹⁶² 2001 SI 3635. The instrument applies largely to insurers liable under “contracts of long term insurance” (which excludes Equitas Re and Equitas Ltd., even though their insurance liabilities are likely to exceed in time most long-term contracts): see Insurers (Winding-Up) Rules 2001, *passim*. A contract of long-term insurance is, broadly, a contract of insurance of or relating to life, annuity, marriage, birth, linked long term, permanent health, tontines, capital redemption, pension fund management, collective insurance and social insurance: *ibid.*, §2(1) read with Financial Services and Market Act 2000 (Regulated Activities) Order 2001 (2001 SI 544) §3(1) and *ibid.*, Sch. 1, Part II. So-called “contracts of general insurance” (essentially every other type of insurance, however longevitous) are defined at *ibid.*, Part I (see especially *ibid.*, §13 (general liability)).

¹⁶³ Insurers (Winding Up) Rules 2001, Rule 6 (Valuation of general business policies):-

Except in relation to amounts which have fallen due for payment before the liquidation date and liabilities referred to in paragraph 2(l)(b) of Schedule 1, the holder of a general business policy shall be admitted as a creditor in relation to his policy without proof for an amount equal to the value of the policy and for this purpose the value of a policy shall be determined in accordance with Schedule 1.

Ibid., Sch. 1, §1 (“Rules for valuing general business policies”):-

1. This paragraph applies in relation to periodic payments under a general business policy which fall due for payment after the liquidation date where the event giving rise to the liability to make the payments occurred before the liquidation date. (2) The value to be attributed to such periodic payments shall be determined on such actuarial principles and assumptions in regard to all relevant factors as the court shall direct.

2. (1) This paragraph applies in relation to liabilities under a general business policy which arise from events which occurred before the liquidation date but which have not(a) fallen due for payment before the liquidation date; or (b) been notified to the company before the liquidation date. (2) The value to be attributed to such liabilities shall be determined on such actuarial principles and assumptions in regard to all relevant factors as the court shall direct.

3.(1) This paragraph applies in relation to liabilities under a general business policy not dealt with by paragraphs 1 or 2. (2) The value to be attributed to those liabilities shall — (a) if the terms of the policy provide for a repayment of premium upon the early termination of the policy or the policy is expressed to run from one definite date to another or the policy may be terminated by any of the parties with effect from a definite date, be the greater of the following two amounts: (i) the amount (if any) which under the terms of the policy would have been repayable on early termination of the policy had the policy terminated on the liquidation date, and (ii) where the policy is expressed to run from one definite date to another or may be terminated by any of the parties with effect from a definite date, such proportion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which that premium was paid; and (b) in any other case, be a just estimate of that value.

¹⁶⁴ See for example EATD, §§12(1), 15.

¹⁶⁵ See for example Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution):-

100. If the Company is wound up, the liquidator may, with the sanction of an extraordinary resolution of the Company and any other sanction required by the Insolvency Act 1986, divide among the members in specie the whole or any part of the assets of the Company and may, for that purpose, value any assets and determine how the division shall be carried out as between the members or different classes of members. The liquidator may, with the like sanction, vest the whole or any part of the assets in trustees upon such trusts for the benefit of the members as he with the like sanction determines, but no member shall be compelled to accept any assets upon which there is a liability. 101. The power of sale of a liquidator shall include a power to sell wholly or partially for shares or debentures or other obligations of another body corporate, either then already constituted or about to be constituted for the purpose of carrying out the sale.

pressly with Equitas Re's¹⁶⁶ and Equitas Ltd.'s¹⁶⁷ liquidation¹⁶⁸ (*cf.* provisional liquidation¹⁶⁹). For example, in relation to Equitas Policyholders Trustee, a RRC 7, §1.1 Insolvency Event includes (among other scenarios) the appointing of a liquidator of Equitas Re.¹⁷⁰

some particular RRC provisions

proving; payouts by Equitas Policyholders Trustee

- 4.22** The amount for which Equitas Policyholders Trustee may prove in Equitas Re's liquidation is limited by reference to calculations made in accordance with RRC 4, Sch. 3, §6 read with *ibid.*, §10.1.¹⁷¹ In proving in Equitas Re's liquidation, Equitas Policyholders Trustee must¹⁷² seek to establish from the information available to it Equitas Re's RRC 4, §3 debts to each Insurance Creditor. Absent sufficient satisfactory evidence from each Insurance Creditor, Equitas Policyholders Trustee is¹⁷³ entitled to assume the accuracy of such of Equitas Re's liquidator's figures as enable Equitas Policyholders Trustee to calculate that debt. Equitas Policyholders Trustee is then required¹⁷⁴ to distribute Equitas Re's money to (among other things¹⁷⁵) satisfy Secured Obligations owing to each Insurance Creditor as determined by Equitas Policyholders Trustee in establishing a proof or claim in Equitas Re's liquidation,¹⁷⁶ and then to each EquitasRe-reinsured SYA participant proportionately to the value of the Trust Property assigned by him, that value to be determined by reference to the amount that Equitas Policyholders Trustee proved in Equitas Re's liquidation.¹⁷⁷ Equitas Policyholders Trustee is entitled¹⁷⁸ to assume Equitas Re's liquidator's figures' accuracy when adjusting pay-outs to Insurance Creditors under RRC 7, §2.7(b).

other

- 4.23** Each EquitasRe-reinsured SYA participant's right to receive any payment from Equitas Re under RRC 4, Sch. 3 is subordinated to (among other things) paying or providing for the paying in full of the expenses of the liquidation.¹⁷⁹ Concerning Equitas Ltd., its liquidator is permitted to "recalculate" Equitas Ltd.'s RRC 5, §2 liability to Equitas Re,¹⁸⁰ and Equitas Re's liquidator is permitted to "recalculate" Equitas Re's RRC 4, §3 liability to any EquitasRe-reinsured SYA participant.¹⁸¹ Concerning Equitas Ltd., the amount for which Equitas Re may prove in Equitas

And see substantially identical Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution, §§100-101; Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §§125-126.

¹⁶⁶ See for example RRC 4, Sch., 3, §§10.1 heading, 10.1, 10.2, 12.

¹⁶⁷ See for example RRC 5, Sch., 3, §§10.1 heading, 10.1, 10.2, 12; RRC 7, §§2.6, 2.7(b), 2.7(d), 2.10, 2.15(b).

¹⁶⁸ See for example in the context of Equitas Re's insolvency, RRC 4, Sch. 3, §§2.3(c), 3.3(iii), 8.1; in the context of Equitas Ltd.'s insolvency, RRC 5, Sch. 3, §§2.3(c), 3.3(iii), 8.1; RRC 7, §2.15(b). Liquidation is a corporate death process rarely undergone by insolvent insurance companies because it is usually too expensive in relation to the company's few surviving assets. Recent examples include Aneco Reinsurance Underwriting Ltd.; Continental Assurance Co. of London Plc; Electric Mutual Liability Insurance Co. Ltd.; London United Investments; National Employers Mutual General Insurance Association.

¹⁶⁹ See p.232.

¹⁷⁰ RRC 7, §2.15(b).

¹⁷¹ RRC 4, Sch. 3, §10.1.

¹⁷² RRC 7, §2.6.

¹⁷³ RRC 7, §2.6.

¹⁷⁴ RRC 7, §2.7.

¹⁷⁵ See generally RRC 7, §2.7.

¹⁷⁶ RRC 7, §2.7(b).

¹⁷⁷ RRC 7, §2.7(d).

¹⁷⁸ RRC 7, §2.10.

¹⁷⁹ RRC 4, Sch. 3, §12.

¹⁸⁰ RRC 5, Sch. 3, §10.1.

¹⁸¹ RRC 4, Sch. 3, §10.1.

Ltd.'s liquidation is limited by reference to calculations made in accordance with RRC 5, Sch. 3, §6 read with *ibid.*, §10.1.¹⁸² Equitas Re's right to receive any payment from Equitas Ltd. under RRC 5, Sch. 3 is subordinated to (among other things) paying or providing for the paying in full of the expenses of the liquidation.¹⁸³

PROVISIONAL LIQUIDATION

4.24 Provisional liquidation¹⁸⁴ (which does not always provide a litigation moratorium¹⁸⁵) is expressly alluded to in various RRCs¹⁸⁶ and elsewhere.¹⁸⁷ In relation to Equitas Re, a RRC 4, Sch. 3 Automatic Reinsurance Trigger Event¹⁸⁸ includes (among other scenarios) the appointment of a provisional liquidator of Equitas Re,¹⁸⁹ and the date of his appointment determines the date on which an Automatic Reinsurance Trigger Event-precipitated adjustment¹⁹⁰ takes effect.¹⁹¹ If Equitas Ltd. puts it on notice that it intends to apply to a court for the appointment of a provisional liquidator, Equitas Re becomes entitled to take the same action.¹⁹² In relation to Equitas Ltd., a RRC 5, Sch. 3 Automatic Trigger Event includes (among other scenarios) the appointment of a provisional liquidator of Equitas Ltd.;¹⁹³ the date of his appointment determines the date on which an Automatic Trigger Event-precipitated adjustment takes effect.¹⁹⁴ If Equitas Ltd.'s board consider that they are unable, for whatever reason, to make a determination required for RRC 5, Sch. 3, §§5 and 6, Equitas Ltd. becomes entitled to apply to the court for the appointment of a provisional liquidator.¹⁹⁵ In relation to Equitas Policyholders Trustee, a RRC 7, §1.1 Insolvency Event includes (among other scenarios) the appointing of a provisional liquidator of Equitas Re.¹⁹⁶

¹⁸² RRC 5, Sch. 3, §10.1.

¹⁸³ RRC 5, Sch. 3, §12.

¹⁸⁴ See generally Insolvency Act 1986, s.135:-

(1) Subject to the provisions of this section, the court may, at any time after the presentation of a winding-up petition, appoint a liquidator provisionally. (2) In England and Wales, the appointment of a provisional liquidator may be made at any time before the making of a winding-up order; and either the official receiver or any other fit person may be appointed. ... (4) The provisional liquidator shall carry out such functions as the court may confer on him. (5) When a liquidator is provisionally appointed by the court, his powers may be limited by the order appointing him.

Recent examples of UK insurance companies in provisional liquidation include BAI (Run-Off) Ltd.; Black Sea & Baltic General Insurance Co. Ltd.; Independent Insurance Co. Ltd.; Municipal General Insurance Co. Ltd.; North Atlantic Insurance Co. Ltd.; Pan Atlantic Insurance Co. Ltd.; UIC Insurance Co. Ltd.; United Standard Insurance Co. Ltd.

¹⁸⁵ On Insolvency Act 1986, s.130(2) (the court's leave required to proceed against a company in provisional liquidation), see recently *New Cap Reinsurance Corporation Ltd. v HIH Casualty & General Insurance Ltd.* (CA, February 20, 2002; unreported); *Re Aro Ltd.* [1980] Ch. 186 (CA).

¹⁸⁶ See for example in the context of Equitas Re's insolvency, RRC 4, Sch., 3, §§10.1 heading, 10.1, 10-2, 12; in the context of Equitas Ltd.'s insolvency, RRC 5, Sch., 3, §§10.1 heading, 10.1, 10.2, 12; RRC 7, §§2.6, 2.7(b), 2.7(d), 2.10, 2.15(b).

¹⁸⁷ See for example EATD, §§12(1), 15; Equitas standard-form settlement agreement, §7.

¹⁸⁸ See p.239.

¹⁸⁹ RRC 4, Sch. 3, §2.3(c).

¹⁹⁰ See p.240.

¹⁹¹ RRC 4, Sch. 3, §3(iii).

¹⁹² RRC 4, Sch. 3, §8.1.

¹⁹³ RRC 5, Sch. 3, §2.3(c).

¹⁹⁴ RRC 5, Sch. 3, §3(iii).

¹⁹⁵ RRC 5, Sch. 3, §8.1.

¹⁹⁶ RRC 7, §2.15(b).

RECEIVERSHIP

- 4.25 A RRC 7, §2.15 Insolvency Event occurs when (among other scenarios) a receiver is appointed made with respect to Equitas Re or the whole or any substantial part of its assets.¹⁹⁷

SCHEME OF ARRANGEMENT

orientation

- 4.26 A Companies Act 1985, s.425 scheme of arrangement¹⁹⁸ has been a fashionable¹⁹⁹ vehicle for running off, and (in the case of a cut-off scheme of arrangement) bringing to a relatively prompt conclusion, the liabilities of an insolvent English insurance company,²⁰⁰ whether not yet subject to an formal insolvency procedure, already in liquidation,²⁰¹ or subject to an administration order.²⁰² Three varieties have evolved: the run-off scheme, of uncertain duration and outcome; the estimation and valuation (“cut-off”) scheme²⁰³ — intended to be of shorter duration and definitive outcome; and the hybrid scheme, *viz.*, a run-off scheme which in due course becomes a cut-off scheme. The court has power to sanction a compromise or arrangement arrived at between a company and at least three-quarters in value of its creditors either overall or of a particular class.²⁰⁴ That approved arrangement is then binding on the company and the relevant creditors;²⁰⁵ US courts may issue related injunctions.²⁰⁶ If the company is already in liquidation, the arrange-

¹⁹⁷ RRC 7, §2.15(d).

¹⁹⁸ See recently for example *Re Equitable Life Assurance Society* (Lloyd J; November 26, 2001; unreported); *Re Hawk Insurance Company Ltd.* [2001] 2 BCLC 480 (CA); *Re Osiris Insurance Ltd.* [1999] 1 BCLC 182 (Neuberger J); *Re Axa Equity & Law Life Assurance Society plc and Axa Sun Life plc* [2001] 1 All ER (Comm) 1010 (Evans-Lombe J).

¹⁹⁹ Recent examples of UK insurance companies which have adopted s.425 schemes include Andrew Weir Insurance Company Ltd.; Anglo American Insurance Company Ltd.; Bermuda Fire & Marine Insurance Company Ltd.; Bristol Re Insurance Company Ltd.; Bryanston Insurance Company Ltd.; Chancellor Insurance Company Ltd.; Charter Re Insurance Company Ltd.; Chester Street Insurance Services Ltd.; English & American Insurance Company Ltd.; Fremont Insurance Company (UK) Ltd.; Hawk Insurance Company Ltd.; ICS Reinsurance Pte Ltd.; ICS (UK) Ltd.; the KWELM companies (Kingscroft Insurance Company Ltd.; Walbrook Insurance Company Ltd.; El Paso Insurance Company Ltd.; Lime Street Insurance Company Ltd.; Mutual Reinsurance Company Ltd.); London & Overseas Insurance Company Ltd.; Monument Marine and General Insurance Company Ltd.; OIC Run-off Ltd.; Pine Top Insurance Company Ltd.; RMCA Reinsurance Ltd.; Scan Re Insurance Company Ltd.; Sovereign Marine and General Insurance Company Ltd.; Stockholm Re (Bermuda) Ltd.; Trinity Insurance Company Ltd.

²⁰⁰ The KWELM scheme of arrangement is an example of the genre: For a summary, see for example KWELM 7th Annual Report to Creditors for the year ended 31 December 2000. It pays out in US dollars (KWELM 7th Annual Report to Creditors for the year ended 31 December 2000, p.1) an average of 30% (*ibid.*, p.3) on mostly US casualty, professional indemnity and other liability products (*ibid.*, p.15) to assureds mostly resident in the US (*ibid.*, p.1).

²⁰¹ Companies Act 1985, s.425(1).

²⁰² Companies Act 1985, s.425(1).

²⁰³ See recently for example *Re Hawk Insurance Company Ltd.* [2001] 2 BCLC 480 (CA). Historically see *S&M*, §50(d) (p.18):-

Names would be likely to vote in favour of a scheme of arrangement if policyholders were to agree to release Names from the remaining percentage of their liabilities not covered by assets remaining within Equitas. The ultimate policyholders may be willing to release their residual claims against names, if that were the price for receiving an immediate payment from Equitas.

²⁰⁴ Companies Act 1985, s.425(2). As to classes of creditor, see recently for example *Re Equitable Life Assurance Society* (Lloyd J; November 26, 2001; unreported); *Re Hawk Insurance Company Ltd.* [2001] 2 BCLC 480 (CA); *Re Osiris Insurance Ltd.* [1999] 1 BCLC 182 (Neuberger J; and see *ibid.* at 190-191 on sophisticated and unsophisticated, large and small assureds).

²⁰⁵ Companies Act 1985, s.425(2).

²⁰⁶ See for example the KWELM administrators' 7th Annual Report to Creditors (2000), p.13:-

The vast majority of claims should be agreed without recourse to arbitration or litigation. The Arrangement does, however, contain provisions delaying the commencement or continuation of proceedings (to establish the existence or amount of a claim) against the KWELM companies other than in specified circumstances. This is supported by a permanent Injunction Order under Section 304 of the US Bankruptcy Code which enjoins and restrains policyholders and creditors from proceeding against the KWELM companies or their property in the United States, except as permitted by the Arrangement. These provisions exist to avoid the KWELM companies being unnecessarily involved in expensive, protracted and complex litigation.

ment is binding on the liquidator.²⁰⁷ The court order takes effect when an office copy has been delivered to the Registrar of Companies.²⁰⁸

**some R&R provisions
proposing a scheme**

- 4.27** A scheme of arrangement is mentioned in RRCs.²⁰⁹ Most fundamentally, RRC 4, §4.1 “Assigned Property” includes each EquitasRe-reinsured SYA participant’s rights against Equitas Re pursuant to such a scheme.²¹⁰ If members of Equitas Ltd.’s board consider that they are unable, for whatever reason, to make a determination required for the purposes of RRC 5, Sch. 3, §§5 and 6, Equitas Ltd. then becomes entitled to take action with a view to promoting a s.425 scheme.²¹¹ If Equitas Ltd. notifies it that Equitas Ltd. is to take any action with a view to promoting a s.425 scheme, Equitas Re may take such action.²¹² If Equitas Ltd. proposes a s.425 scheme after a RRC 5, Sch. 3, §2.1 Certified Trigger Event has occurred, Equitas Ltd.’s liability to Equitas Re under RRC 5, §2 must be quantified according to RRC 5, Sch. 3 unless and until varied by the terms of an approved s.425 scheme.²¹³ Similarly, if Equitas Re proposes a s.425 scheme after the occurrence of a RRC 4, Sch. 3, §2.1 Certified Reinsurance Trigger Event, its RRC 4, §3 liability to EquitasRe-reinsured SYA participants must be quantified according to RRC 4, Sch. 3 unless and until varied by the terms of an approved s.425 scheme.²¹⁴

payment out

- 4.28** Equitas Re’s right to receive any payment from Equitas Ltd. under RRC 5, Sch. 3 is subordinated to (among other things) paying or providing for the paying in full of the expenses of an Equitas Ltd. section 425 scheme.²¹⁵ Similarly, each EquitasRe-reinsured SYA participant in relation to expenses of an Equitas Re section 425 scheme.²¹⁶ Equitas Policyholders Trustee is empowered to receive RRC 7, §1.1 Trust Property pursuant to a s.425 scheme made between Equitas Re and its creditors, must distribute that property to Insurance Creditors in accordance with RRC 7, §2.7,²¹⁷ and is entitled to assume the accuracy of calculations produced in the course of that scheme in relation to an EquitasRe-reinsured SYA participant’s relevant liability to an EquitasRe-assured-at-Lloyd’s.²¹⁸ The EquitasRe-reinsurance Trustees, for their part, are empowered²¹⁹ to consent to any scheme of arrangement in relation to Equitas Holdings or any of its subsidiaries as they in their absolute discretion think fit

²⁰⁷ Companies Act 1985, s.425(2).

²⁰⁸ Companies Act 1985, s.425(3).

²⁰⁹ See for example RRC 4, §4.1(a)(ii); RRC 4, Sch. 3, §8.1(a); RRC 5, Sch. 3, §8.1(a); RRC 7, §2.5.

²¹⁰ RRC 4, §4.1(a)(ii); and see RRC 7, recital (B)(a)(ii).

²¹¹ RRC 5, Sch. 3, §8.1(a)

²¹² RRC 4, Sch. 3, §8.1(a).

²¹³ RRC 5, Sch. 3, §11.

²¹⁴ RRC 4, Sch. 3, §11.

²¹⁵ RRC 5, Sch. 3, §12.

²¹⁶ RRC 4, Sch. 3, §12.

²¹⁷ RRC 7, §2.5.

²¹⁸ RRC 7, §2.6.

²¹⁹ RRC 17, §8.1(m).

Sub-chapter 3: proportionate cover

ORIENTATION

relevance to the EquitasRe-assured-at-Lloyd's

- 4.29 RRC 4, Sch. 3's Proportionate Cover Plan — designed to avoid²²⁰ the appearance, rather than deal fully with the reality, of insolvency at Equitas Re — has been described as “a mechanism whereby Equitas may pay claims at a reduced rate if liabilities exceed assets at any time in the future”.²²¹ Contrary to apparent indications²²² by self-regulators-at-Lloyd's and the DTI (see below), there appears to be no legal basis for the notion that Proportionate Cover has any binding effect on an EquitasRe-assured's-at-Lloyd's own insurance contractual rights against the Lloyd's enterprise. For as long as the Lloyd's enterprise purports to be solvent and trades as a going concern, Proportionate Cover of itself (like any other insolvency process to which Equitas Re may be statutorily or contractually subject) at Equitas Re appears to be irrelevant to those rights.²²³ However, Proportionate Cover at was apparently included at the DTI's “request”²²⁴ to “protect the policyholder”²²⁵ “[g]iven the inherent uncertainty in any insurance business”.²²⁶ Appearing to

220 *SOD*, p.99: Proportionate Cover Plan is “designed to help avoid Equitas Reinsurance or Equitas Limited, in the event that either becomes unable to pay the 1992 and prior liabilities in full, going into insolvent liquidation or having to promote a scheme of arrangement”.

221 *SOD*, p.98.

222 See for example perhaps *SOD*, App. 7, first unnumbered page, §A (italics added): “The Council has concluded that the Reconstruction and Renewal plan: (a) is in the best interests of the Society; and (b) is better than the alternative of allowing the Society to cease to trade and to go into run-off which would inflict severe damage and *increased liabilities* on members.”

223 See p.214.

224 *SOD*, App. 5, §1.4 (p.2):-

Given the inherent uncertainty in any insurance business, there is a risk that Equitas may not be able to meet the 1992 and prior liabilities in full. At the request of the DTI, the Reinsurance Contract will contain provisions for the implementation of a proportionate cover plan. In making any decision to implement such a plan, Equitas will be obliged to act in good faith.

And see *ibid.*, §1.12 (p.3):-

The DTI is concerned to ensure the protection of underlying policyholders. Accordingly, Names' rights to recover under the reinsurance obligation contained in the Reinsurance Contract, including all rights in a winding-up of Equitas Reinsurance, will therefore be assigned to Equitas Policyholders Trustee and will be held on trust for the discharge and payment of obligations to policyholders.

And see *ibid.*, p.99:-

At the request of the DTI, a plan has been designed to help avoid Equitas Reinsurance or Equitas Limited, in the event that either becomes unable to pay the 1992 and prior liabilities in full, going into insolvent liquidation or having to promote a scheme of arrangement. If Equitas determines that it has insufficient assets to meet all future claims, it can decide whether to implement a proportionate cover plan (or, if such a plan is already in place, to amend the existing plan) or to pursue normal insolvency procedures (including, for example, a scheme of arrangement). If Equitas decides to implement a proportionate cover plan, it will be entitled to pay claims at a reduced rate. It may also defer payment of claims on a temporary basis while details of any plan are being finalised.

225 The DTI's preliminary view, appended to *SOD*, was that the Secretary of State was satisfied that the interests of assureds-at-Lloyd's would be “suitably protected”. *SOD*, App. 4, July 26, 1996 letter to the Corporation's then CEO from the DTI's then Director, Insurance Directorate, that letter, first unnumbered page:-

[T]he Secretary of State is satisfied that the interests of policyholders of Names who cease to be members of the Society with the benefit of Equitas and/or syndicate reinsurance to close will be suitably protected where: (i) the relevant authorisation conditions on Equitas have been lifted and the Equitas reinsurance has become effective; and (ii) Equitas and/or (in respect of a syndicate reinsurance to close) the relevant Lloyd's syndicates continue to pay claims in full without the performance of contracts of insurance reverting in whole or in part to resigned Names.

See incidentally *S&M*, §52(a) (p.18-19):-

Some Names have expressed scepticism about the value of the DTI's role in relation to Names. Certainly, the DTI's statutory obligation is to have regard to the interests of policyholders, including Names, but this is more likely to contribute to the financial viability of Equitas than to the opposite. Furthermore, whatever some Names may regard as the failings of the DTI in the past, the present spotlight of publicity is likely to concentrate the DTI's mind as never before.

226 *SOD*, App. 5, §1.4.

have believed²²⁷ — the belief appears to be erroneous²²⁸ as a matter of statutory and common law and in contract — that Proportionate Cover does bind the EquitasRe-assured-at-Lloyd’s, the DTI appears not to have objected to the Council promulgating various Central Fund use and contribution restrictions, and appears to have made no effort to refer, or require the Lloyd’s enterprise to refer, any EquitasRe-assured-at-Lloyd’s to available recourse sources at Lloyd’s.

Proportionate Cover: orientation

- 4.30** RRC 4, §3.5 permits Equitas Re to repeatedly²²⁹ “adjust”²³⁰ its §3 reinsurance contractual insurance obligations, from their 100% primordial level to any lesser number, on certain “Trigger Events”; each of the Trigger Events precipitating Proportionate Cover bespeaks real-life insolvency processes. Proportionate Cover thus creates the illusion of solvency in circumstances which ordinarily would be considered simple insolvency. Equitas Re is empowered²³¹ to put in place any successive number of Proportionate Cover Plans and may adjust up or down any Proportionate Cover Rate provided that that rate is always less than 1, which by definition would presumably indicate or presage Equitas Re’s Insolvency Act 1986, s.123 inability to pay its debts in full as they fell due. RRC 5 contains substantially similar provisions in relation to Equitas Ltd. Given that company’s role as the Equitas Group’s principal operating company,²³² Proportionate Cover is likely to start as a Retrocession Plan²³³ at Equitas Ltd. Equitas Re would presumably find it impossible as a practical matter not thereafter to sustain its own RRC 4, Sch. 3, §2.1 or 2.3 Reinsurance Trigger Event and thus implement (subject to the latitude²³⁴ built into RRC 4, Sch. 3) a Proportionate Cover Plan. That event of itself does not constitute a RRC 7, §2.15 Insolvency Event such as to require Equitas Policyholders Trustee’s *ibid.*, §2.4 *et seq.* intervention on behalf of EquitasRe-assureds-at-Lloyd’s; indeed, it (and even its mere unutilised availability²³⁵) protects²³⁶ Equitas Re from that intervention. Equitas Re and Equitas Ltd. each respectively promise “for the benefit of the Names and Closed Year Names” — the assured-at-Lloyd’s is not mentioned — to act “bona fide”²³⁷ and take “all reasonable skill, care and diligence”²³⁸ in “arriving”²³⁹ at a decision to activate a such a plan (suggesting a transparent and robust decision-making process).

TRIGGER EVENTS AND THEIR CONSEQUENCES

orientation

four types

- 4.31** RRC 4, Sch. 3 provides in relation to Equitas Re for a “Certified Reinsurance Trigger Event” and an “Automatic Reinsurance Trigger Event”. RRC 5, Sch. 3 provides in relation to Equitas

²²⁷ See DTI March 29, 1996 press release, Lloyd’s: Conditional Authorisation of Equitas Proposals. *Ibid.*, p.4: “[I]f against expectations the liabilities of Equitas at some future point should appear to be on the point of exceeding the assets available, arrangements will have been built into the reinsurance contract [RRC 4] with Names designed to ensure that policyholders would continue to receive an uninterrupted flow of claims payments, albeit at less than 100 percent”.

²²⁸ See p.214.

²²⁹ RRC 4, Sch. 3, §4; RRC 5, Sch. 3, §4.

²³⁰ RRC 4, Sch. 3, §3.1 *et seq.*; RRC 5, Sch. 3, §3.1 *et seq.*

²³¹ RRC 4, Sch. 3, §4.

²³² See p.39.

²³³ See generally RRC 5, §2.4 and *ibid.*, Sch. 3.

²³⁴ See generally RRC 4, Sch. 3, §§5.1, 8.1, 8.2, etc.

²³⁵ See RRC 7, §2.15(c)(ii).

²³⁶ See RRC 7, §2.15(c)(i) and (ii).

²³⁷ RRC 4, §3.6.

²³⁸ RRC 4, §3.6.

²³⁹ RRC 4, §3.6.

Ltd. for a “Certified Trigger Event” and an “Automatic Trigger Event”. Trigger Events precipitate consideration of proportionate cover.

consultation with Insurance Creditors and regulators

- 4.32 Equitas Re’s board becomes “entitled” to consult with “Insurance Creditors” (as defined²⁴⁰) in relation to the Proportionate Cover Rate when a Certified Reinsurance Trigger Event does occur, or when Equitas Re’s board becomes aware of facts or circumstances which the board considers make a Certified Reinsurance Trigger Event “likely”.²⁴¹ In relation to a Proportionate Cover Plan arising from a “Certified” or “Automatic” “Reinsurance Trigger Event”, Equitas Re’s board is “entitled” to consult with such regulatory authorities as it considers appropriate with a view to particularly ensuring that “Dedicated Assets” (as defined) are applied “in the manner and at the rate contemplated by the Proportionate Cover Plan and not otherwise”,²⁴² including, presumably, not as originally contemplated if different. There is no such consultation provision in relation to an Automatic reinsurance Trigger Event. At Equitas Ltd., on a Certified Trigger Event, or on Equitas Ltd.’s board becoming aware of facts or circumstances which it considers makes such an Event “likely”, the board becomes entitled but not obliged to consult with all or some Insurance Creditors (presumably as defined elsewhere²⁴³) in relation to the setting of a Retrocession Rate, suspension of payments, or other matters in Equitas Ltd.’s sole discretion.²⁴⁴

“Certified”

at Equitas Re

- 4.33 Equitas Re’s board must activate a Proportionate Cover Plan in any of three so-called “Certified Reinsurance Trigger Events”:²⁴⁵ At Equitas Re, a “Certified Reinsurance Trigger Event” is: (1) an Equitas Re Proportionate Cover Plan not being already in effect, if Equitas Re’s board determines, taking into account Equitas Re’s prospective and contingent liabilities and after providing to pay Equitas Re’s General Creditors in full, that the Relevant Original Liabilities would exceed Relevant Available Assets (as valued on a going-concern basis²⁴⁶) but for a Proportionate Cover Plan.²⁴⁷ To the extent that Equitas Re decides to adjust its liability to EquitasRe-reinsured SYA participants, and that Equitas Ltd. decides to adjust its liability to Equitas Re, each agrees to take that adjusting decision “for the benefit of the Names and Closed Year Names”, and “bona fide”²⁴⁸ and take “all reasonable skill, care and diligence”²⁴⁹ in “arriving”²⁵⁰ at a relevant decision; (2) an Equitas Re Proportionate Cover Plan being already in effect, if Equitas Re’s board determines, taking into account Equitas Re’s prospective and contingent liabilities and after providing to pay Equitas Re’s General Creditors in full, that the Relevant Original Liabilities would exceed Relevant Available Assets (as valued on a going-concern basis²⁵¹) given the current Proportionate Cover Rate;²⁵² (3) Equitas Re’s receipt of a notice from Equitas Ltd. that a “Certified Trigger Event” (as defined in RRC 5²⁵³) or “Automatic Trigger Event” (as defined in RRC 5²⁵⁴)

²⁴⁰ See its definition at RRC 4, Sch. 2, §1.

²⁴¹ RRC 4, Sch. 3, §2.4.

²⁴² RRC 4, Sch. 3, §6.3.

²⁴³ “Insurance Creditors” is not defined in either RRC 5 or RRC 5, Sch. 3.

²⁴⁴ RRC 5, Sch. 3, §2.4.

²⁴⁵ See generally RRC 4, Sch. 3, §2.1.

²⁴⁶ RRC 4, Sch. 3, §2.2.

²⁴⁷ RRC 4, Sch. 3, §2.1(a).

²⁴⁸ RRC 4, §3.6.

²⁴⁹ RRC 4, §3.6.

²⁵⁰ RRC 4, §3.6.

²⁵¹ RRC 4, Sch. 3, §2.2.

²⁵² RRC 4, Sch. 3, §2.1(b).

²⁵³ The definition is at RRC 5, Sch. 3, §2.1: RRC 4, Sch. 3, §2.1(c).

has occurred.²⁵⁵ In the first two cases, such determination must take into account provision for paying Equitas Re's General Creditors (as defined;²⁵⁶ as distinct from Insurance Creditors) in full.

at Equitas Ltd.

- 4.34** At Equitas Ltd., a "Certified Trigger Event" occurs when Equitas Ltd.'s board determines that relevant unadjusted²⁵⁷ liabilities exceed relevant assets, whether or not a Retrocession Plan is in effect.²⁵⁸

"adjustment" on a "Certified Reinsurance Trigger Event"

- 4.35** On the occurrence of a "Certified Reinsurance Trigger Event",²⁵⁹ Equitas Re's liabilities to EquitasRe-reinsured SYA participants and other so-called "Reinsured Parties"²⁶⁰ in relation to the entirety²⁶¹ of current outstanding "Reinsurance Indemnities" must²⁶² be "adjusted" to equal²⁶³ {Original Liability²⁶⁴ x Proportionate Cover Rate²⁶⁵ + any Adjustment Entitlement²⁶⁶}. The adjustment takes effect on and from the date specified by Equitas Re's board in the relevant Interim Proportionate Cover Declaration,²⁶⁷ which declaration Equitas Re's board must issue "promptly" after the occurrence.²⁶⁸ The only eventualities excusing Equitas Re from then having to actually implement a Proportionate Cover Plan if one is not already in place, or to adjust an existing Proportionate Cover Plan's Proportionate Cover Rate, are those specified at RRC Sch 3, §8 (discussed below).²⁶⁹ In order to implement a Proportionate Cover Plan in the case of a Certified Reinsurance Trigger Event, Equitas Re's board must "without undue delay" determine as at the "Record Date": (1) the value of the "Available Assets"; (2) the value of "US Trust Assets"; (3) the value of the "ECTF Assets"; (4) the value of the "Australian Custody Assets"; (5) the amount of the "Original Liabilities"; (6) the amount of the "Relevant Original Liabilities" applicable to "American Business", "Canadian Business", "Australian Business", and "Residual Business"; (7) the amount owing to "General Creditors". Equitas Re's board appears to be given latitude to make other, unspecified determinations, but the provision is vague.²⁷⁰ In any of these determinations, Equitas Re's board is entitled to rely on evidence supplied by Equitas Ltd.²⁷¹

²⁵⁴ The definition is at RRC 5, Sch. 3, §2.3; RRC 4, Sch. 3, §2.1(c).

²⁵⁵ RRC 4, Sch. 3, §2.1(c).

²⁵⁶ At RRC 4, Sch. 2, §1.

²⁵⁷ See RRC 5, §2.4.

²⁵⁸ RRC 5, Sch. 3, §2.1(a) (Retrocession Plan not in effect) and *ibid.*, (b) (Retrocession Plan in effect). "Relevant Original Liabilities" and "Relevant Available Assets" are the terms used. See also the definition at *ibid.* of "Available Assets" and "General Creditors".

²⁵⁹ See generally RRC 4, Sch. 3, §2.

²⁶⁰ RRC 4, Sch. 3, §3.1. For definition of "Reinsured Parties", see RRC 4, Sch. 2, §1.

²⁶¹ RRC 4, Sch. 3, §5.3.

²⁶² RRC 4, Sch. 3, §3.1.

²⁶³ RRC 4, Sch. 3, §3.1.

²⁶⁴ Defined at RRC 4, Sch. 2, §1.

²⁶⁵ Defined at RRC 4, Sch. 2, §1.

²⁶⁶ Defined at RRC 4, Sch. 2, §1.

²⁶⁷ RRC 4, Sch. 3, §3.2. Defined at RRC 4, Sch. 2, §1.

²⁶⁸ RRC 4, Sch. 3, §3.2.

²⁶⁹ RRC 4, Sch. 3, §5.1.

²⁷⁰ See RRC 4, Sch. 3, §5.1, last line.

²⁷¹ RRC 4, Sch. 3, §5.2.

RRC 4, Sch 3, §8: where no adjustment required

- 4.36 Adjustment is a mandatory element in Equitas Re’s board’s declaration of a Certified Reinsurance Trigger Event unless Equitas Re is put on notice that Equitas Ltd.’s board: (1) is “to take”²⁷² “any action” “with a view to either Equitas Ltd.’s liquidation²⁷³ or to promoting” either a Companies Act 1985, s.425 scheme of arrangement or Insolvency Act 1986, Part I voluntary arrangement.²⁷⁴ If Equitas Re’s board does propose a Companies Act 1985, s.425 arrangement or compromise after a Certified Reinsurance Trigger Event has occurred, Equitas Re’s liability in relation to “Relevant Reinsurance Indemnities” (as defined²⁷⁵) is as revised under RRC 4, Sch. 3 unless and until varied by such arrangement or compromise as may be approved;²⁷⁶ (2) is “to”²⁷⁷ exercise its rights to take advantage of some other available insolvency resort;²⁷⁸ (3) to apply to the court for the appointment of a provisional liquidator for Equitas Ltd.²⁷⁹ In any such event, Equitas Re’s board is empowered to do the same thing.²⁸⁰

suspension of relevant payments

- 4.37 On the occurrence of a Certified Reinsurance Trigger Event, Equitas Re becomes entitled under RRC 4, Sch. 3 to reduce or suspend payments in relation to RRC 4 Reinsurance Indemnities.²⁸¹ Equitas Re may exercise that right only for “the minimum period reasonably necessary”²⁸² and only if at the same or about the same time it also exercises the equivalent power granted pursuant to all other Reinsurance Indemnities.²⁸³ The power to reduce or suspend is expressly limited to payments further to Equitas Re’s Reinsurance Indemnities.²⁸⁴ To the extent that Equitas Re does avail itself of the power to reduce or suspend, each EquitasRe-reinsured SYA participant agrees not to take any step or proceeding against Equitas Re or its property, in any jurisdiction, to enforce Equitas Re’s performance of its Reinsurance Indemnities;²⁸⁵ or to apply to the court under Insurance Companies Act 1982, s.53 for leave to petition for Equitas Re’s winding up, or take or seek to take any action under any statutory or common law power, including Insolvency Act 1986, s.122.²⁸⁶

“Automatic”**at Equitas Re**

- 4.38 Equitas Re’s board is required²⁸⁷ to adjust the company’s liabilities using a Proportionate Cover Rate — but appears to have no obligation or power to implement a Proportionate Cover Plan properly so defined²⁸⁸ — in any of three so-called “Automatic Reinsurance Trigger Events”:²⁸⁹

²⁷² Ambiguous: could mean “will take” or “is required to take”.

²⁷³ RRC 4, Sch. 3, §8.1(b) and *ibid.*, §5.1.

²⁷⁴ RRC 4, Sch. 3, §8.1(a) and *ibid.*, §5.1.

²⁷⁵ Defined at RRC 4, Sch. 2, §1.

²⁷⁶ RRC 4, Sch. 3, §11.

²⁷⁷ Ambiguous: could mean “about to”, “going to”, etc.

²⁷⁸ RRC 4, Sch. 3, §8.1(c) and *ibid.* §5.1.

²⁷⁹ RRC 4, Sch. 3, §8.1 (*cf. ibid.*, §2.3(c) — the actual appointment of a provisional liquidator) and *ibid.* §5.1.

²⁸⁰ RRC 4, Sch. 3, §8.1.

²⁸¹ See generally RRC 4, Sch. 3, §9.

²⁸² RRC 4, Sch. 3, §9, first sentence.

²⁸³ RRC 4, Sch. 3, §9, first sentence, proviso.

²⁸⁴ RRC 4, Sch. 3, §9, second sentence.

²⁸⁵ RRC 4, Sch. 3, §9(a).

²⁸⁶ RRC 4, Sch. 3, §9(b).

²⁸⁷ RRC 4, Sch. 3, §3.1.

²⁸⁸ *Cf.* RRC 4, Sch. 3, §5.1 (applicable only to a Certified Reinsurance Trigger Event). And see RRC 7, §2.15(b) compared to *ibid.*, (c).

²⁸⁹ See generally RRC 4, Sch. 3, §2.3.

At Equitas Re, an Automatic Reinsurance Trigger Event is: (1) the passing of a resolution by the company's member — Equitas Holdings²⁹⁰ — to put Equitas Re into voluntary liquidation;²⁹¹ (2) the making of a court order compulsorily winding up Equitas Re;²⁹² (3) the actual²⁹³ appointment of a provisional liquidator for Equitas Re.²⁹⁴ The Automatic Trigger Event is no less even if the court happens to then exercise its Insolvency Act 1986, s.177 power to appoint a special manager in a way which circumvents the provisional liquidator: the Automatic Trigger Event is the provisional liquidator's appointment, not the exercise of any of his functions.

at Equitas Ltd.

- 4.39** At Equitas Ltd., an “Automatic Trigger Event” is: (1) the passing of a resolution by the company's member — Equitas Re²⁹⁵ — to put Equitas Ltd. into voluntary liquidation;²⁹⁶ (2) the making of a court order compulsorily winding up Equitas Ltd.;²⁹⁷ (3) the appointment of a provisional liquidator of Equitas Ltd.²⁹⁸

what happens on an “Automatic Reinsurance Trigger Event”?

- 4.40** Equitas Re has no power to itself implement any sort of Proportionate Cover Plan (properly defined) in the case of any of the three kinds of Automatic Reinsurance Trigger Event. In such latter events, Equitas Re is required to adjust its liabilities,²⁹⁹ and the adjustment does then take effect,³⁰⁰ but implementing the adjustment is for the liquidator or provisional liquidator.³⁰¹ RRC 4 does not clearly spell out the effect of an Automatic Reinsurance Trigger Event and appears to defectively³⁰² define “Proportionate Cover Plan”. Before its incarceration in a liquidation or provisional liquidation, Equitas Re is required and empowered to recalibrate its relevant liabilities, and that recalibration is then automatically imposed as at the effective date³⁰³ on the liquidator or provisional liquidator (and to some extent similarly in the case of a s.425 scheme of arrangement³⁰⁴). In the case, on the other hand, of a Certified Reinsurance Trigger Event: Equitas Re's obligatory adjustment, that adjustment then takes effect, and Equitas Re then takes the additional required step of implementing³⁰⁵ a (properly defined) Proportionate Cover Plan, a process which does protect³⁰⁶ Equitas Re from a RRC 7, §2.15(c) Insolvency Event (and thus from Equitas Policyholders Trustee's compulsory intervention³⁰⁷). The compulsory, RRC 4, Sch. 3, §3.1 adjustment takes effect on and from the date of the event itself.³⁰⁸ Equitas Re's liability to EquitasRe-reinsured SYA participants under Equitas Re's Reinsurance Indemnity must be determined

²⁹⁰ See p.19.

²⁹¹ RRC 4, Sch. 3, §2.3(a).

²⁹² RRC 4, Sch. 3, §2.3(b).

²⁹³ Cf. RRC 4, §8(1) (Equitas Ltd.'s mere intention to apply to the court for the appointment of a provisional liquidator, which is not an Automatic Reinsurance Trigger Event).

²⁹⁴ RRC 4, Sch. 3, §2.3(c).

²⁹⁵ See p.26.

²⁹⁶ RRC 5, Sch. 3, §2.3(a).

²⁹⁷ RRC 5, Sch. 3, §2.3(b).

²⁹⁸ RRC 5, Sch. 3, §2.3(c).

²⁹⁹ See RRC 4, Sch. 3, §3.1.

³⁰⁰ See RRC 4, Sch. 3, §3.3.

³⁰¹ See for example RRC 4, Sch. 3, §10.1. And see RRC 7, §2.15(b).

³⁰² When read with RRC 4, Sch. 3, §§3.1 and 5.1.

³⁰³ See RRC 4, Sch. 3, §3.3.

³⁰⁴ See RRC 4, Sch. 3, §11.

³⁰⁵ See RRC 4, Sch. 3, §5.1.

³⁰⁶ See RRC 7, §2.15(c)(i) (actual use of a Proportionate Cover Plan) and (ii) (potential use not disavowed).

³⁰⁷ See p.224.

³⁰⁸ RRC 4, Sch. 3, §3.3.

in accordance with RRC 4, Sch. 3, §6 just as in the case of a Certified Reinsurance Trigger Event,³⁰⁹ and a Proportionate Cover Declaration issued;³¹⁰ the requirement³¹¹ for Equitas Re's board to issue an Interim Proportionate Cover Declaration in the context of a Certified Reinsurance Trigger Event does not apply to an Automatic Reinsurance Trigger Event. Equitas Re's liquidator is empowered to recalculate the rate.³¹²

proportionate cover at Equitas Re procedure

- 4.41** Equitas Re's RRC 4, Sch. 3 obligations to adjust relevant liabilities, determine a Proportionate Cover Rate and implement a Proportionate Cover Plan appear to be qualified by RRC 4, Sch. 3, §8.2, a provision of purportedly general applicability, that nothing in *ibid.*, Sch. 3 is to be construed as limiting Equitas Re's board to take such action as it may consider appropriate, including implementing any *ibid.*, §8 insolvency procedure in substitution for a Proportionate Cover Plan or, presumably, not adjusting under *ibid.*, §3 or implementing a Proportionate Cover Plan under *ibid.* §5. In whatever it does choose to do under RRC 4, Sch. 3, Equitas Re's board is entitled to rely on professional advice, and its board's determinations bind EquitasRe-reinsured SYA participants conclusively.³¹³ No EquitasRe-reinsured SYA participant or other party to RRC 4 has any claim against Equitas re or Equitas Ltd., or their respective officers, directors or employees, arising directly or indirectly from any decision taken or not taken concerning RRC 4, Sch. 3's application.³¹⁴ *SOD*³¹⁵ distinguishes (in relation at least to Equitas Policyholders Trustee) between Proportionate Cover Plan and other insolvency processes.

the Rate and the Plan distinguished

- 4.42** Of the genus "Proportionate Cover", there appear to be two types. Either of a Certified or an Automatic Reinsurance Trigger Event requires³¹⁶ Equitas Re to recalibrate its relevant liabilities using a Proportionate Cover Rate,³¹⁷ but only a *Certified* Reinsurance Trigger Event requires³¹⁸ Equitas to "implement" a Proportionate Cover Plan. Every Proportionate Cover Plan involves a Proportionate Cover Rate, but apparently not *vice versa*. A Proportionate Cover Plan's four principal ingredients appear to be the occurrence of a Certified Reinsurance Trigger Event;³¹⁹ adjustment;³²⁰ that adjustment then taking effect;³²¹ and Equitas Re's further overt act of imple-

³⁰⁹ RRC 4, Sch. 3, §10.1

³¹⁰ RRC 4, Sch. 3, §7 read with *ibid.*, §10.1.

³¹¹ At RRC 4, Sch. 3, §3.2.

³¹² RRC 4, Sch. 3, §10.1.

³¹³ RRC 4, Sch. 3, §14.

³¹⁴ RRC 4, Sch. 3, §14.

³¹⁵ See generally for example *SOD*, p.82:-

Equitas Policyholders Trustee limited will act as trustee of rights of Names under the Reinsurance Contract (other than the rights to return premiums and rights to certain other payments) which it will hold for the benefit of underlying policyholders. Equitas Policyholders Trustee will not have an active role in the payment of policyholders' claims in the ordinary course of business, nor in circumstances where proportionate cover is invoked. However, if any insolvency procedure in relation to Equitas were invoked, Equitas Policyholder Trustee would be entitled to prove in the insolvency and would distribute any funds it received among policyholders on a pro rata basis.

And see *ibid.*, p.112:-

A proportionate cover plan would enable Equitas to continue paying a proportion of policyholder claims if it were ever confronted with a shortfall of assets and would enable Equitas to avoid the cessation of claims payment which would otherwise follow if Equitas were forced into insolvency. This procedure will also benefit Names, in that they would avoid the obligation of having to pay the full amount of their liabilities if Equitas were forced to cease paying claims.

³¹⁶ See RRC 4, Sch. 3, §3.1.

³¹⁷ See RRC 4, Sch. 3, §3.1(i).

³¹⁸ See RRC 4, Sch. 3, §5.1.

³¹⁹ See RRC 4, Sch. 3, §5.1, enabling Equitas Re's "implementation" of a Proportionate Cover Plan only in the case of a Certified Reinsurance Trigger Event.

³²⁰ See RRC 4, Sch. 3, §3.1.

mentation.³²² RRC 4, Sch. 2, §1's definition of "Proportionate Cover Plan" is therefore defective: because of the additional step of implementation at RRC 4, Sch. 3, §5.1, reserved to a Certified Reinsurance Trigger Event, neither adjustment³²³ nor the adjustment taking effect³²⁴ amounts to a Proportionate Cover Plan. Any use of the term "Proportionate Cover Plan" in the case of an Automatic Reinsurance Trigger Event would appear to be erroneous.

the four rates

- 4.43** When Equitas Re has determined a Proportionate Cover Rate, it must "promptly" issue a Proportionate Cover Declaration,³²⁵ which, in the case of a Certified Reinsurance Trigger Event, presumably supersedes the Interim Proportionate Cover Declaration already issued.³²⁶ The Proportionate Cover Rate appears to be not necessarily one but, depending on the circumstances, up to³²⁷ four separate rates. However many rates are involved, each must be a number less³²⁸ than 1.³²⁹ The rates are: (1) the "US Trust Rate",³³⁰ *viz.*, the rate at which liabilities applicable to "American Business"³³¹ (excluding "Illinois Retained Business"³³²) "may"³³³ be discharged solely from "US Trust Assets",³³⁴ (2) the "ECTF Rate",³³⁵ *viz.*, the rate at which "liabilities applicable to Canadian Business"³³⁶ "may"³³⁷ be discharged solely from "ECTF Assets",³³⁸ (3) the "Australian Rate",³³⁹ *viz.*, the rate at which the "Australian Business"³⁴⁰ "may"³⁴¹ be discharged solely from the "Australian Custody Assets",³⁴² (4) the "Residual Business Rate",³⁴³ *viz.*, the rate at which Equitas Re "can"³⁴⁴ discharge its "Relevant Original Liabilities" for "Residual Business"³⁴⁵ from its "Non-Dedicated Available Assets".³⁴⁶ The principles governing³⁴⁷ the determi-

³²¹ See RRC 4, Sch. 3, §3.2.

³²² At RRC 4, Sch. 3, §5.1.

³²³ See RRC 4, Sch. 3, §3.1.

³²⁴ See RRC 4, Sch. 3, §§3.2 and 3.3.

³²⁵ RRC 4, Sch. 3, §7. Defined at *ibid.*, Sch. 2, §1.

³²⁶ Per RRC 4, Sch. 3, §3.2.

³²⁷ The "Australian Rate" is calculated only if "applicable": RRC 4, Sch. 3, §6.1(a)(iv).

³²⁸ RRC 4, Sch. 3, §4 prohibits payment by Equitas Re of more than all of a particular liability.

³²⁹ See for example the equation at RRC 4, Sch. 3, §3.1(i).

³³⁰ RRC 4, Sch. 3, §6.1(a)(ii).

³³¹ Note the terminological disparity "American" and "US" at for example RRC 4, Sch. 3, §6.1. Per RRC 4, Sch. 2, §1, "American Business" means the same as in the EATD.

³³² Defined at RRC 4, Sch. 2, §1.

³³³ RRC 4, Sch. 2, §1, definition of "US Trust Rate". Ambiguous (capable of meaning "may be able to", "is permitted to") and therefore to some extent meaningless. *Cf.* "can" in (for example) *ibid.*'s definition of "Residual Business Rate".

³³⁴ Defined at RRC 4, Sch. 2, §1. And see *ibid.*, definition of "US Trust Rate".

³³⁵ RRC 4, Sch. 3, §6.1(a)(iii). Erroneously "ECTF Trust Rate" at RRC 4, Sch. 3, §6.1(b), (c) and (d). There is no such term in RRC 4, Sch. 2 ("Definitions and interpretation").

³³⁶ RRC 4, Sch. 2, §1, definition of "ECTF Rate". *Cf.* the different wording at for example *ibid.*'s definition of "Australian Rate" and the yet different wording at for example *ibid.*'s definition of "Residual Business Rate". Per RRC 4, Sch. 2, §1, "Canadian Business" has the same meaning as in the Equitas Canadian TD.

³³⁷ RRC 4, Sch. 2, §1, definition of "ECTF Rate". Ambiguous (capable of meaning "may be able to", "is permitted to") and therefore to some extent meaningless. *Cf.* "can" in (for example) *ibid.*'s definition of "Residual Business Rate".

³³⁸ Defined at RRC 4, Sch. 2, §1. And see *ibid.*, definition of "ECTF Rate".

³³⁹ RRC 4, Sch. 3, §6.1(a)(iv).

³⁴⁰ Defined at RRC 4, Sch. 2, §1.

³⁴¹ RRC 4, Sch. 2, §1, definition of "Australian Rate". Ambiguous (capable of meaning "may be able to", "is permitted to") and therefore to some extent meaningless. *Cf.* "can" in (for example) *ibid.*'s definition of "Residual Business Rate".

³⁴² Defined at RRC 4, Sch. 2, §1. And see *ibid.*, definition of "Australian Rate".

³⁴³ RRC 4, Sch. 3, §6.1(a)(i).

³⁴⁴ RRC 4, Sch. 2, §1, definition of "Residual Business Rate". *Cf.* "may" in (for example) *ibid.*'s definition of "Australian Rate".

³⁴⁵ Defined at RRC 4, Sch. 2, §1.

nation of each rate appear to be embedded as prescriptive parts of the RRC 4, Sch. 2, §1 definitions of each rate. There is one provision applicable only to the Residual Business Rate, *viz.*, Equitas Re, in calculating that rate and in calculating any additional specific relevant Residual Business Rate in a particular jurisdiction, is entitled to take into account the fact (if Equitas Re is “satisfied” about it) that insurance creditors in that jurisdiction will be paid from assets available only to pay such creditors.³⁴⁸

***proportionate cover at Equitas Ltd.
orientation***

- 4.44** RRC 5, Sch. 3 makes provision (apparently at the DTI’s request³⁴⁹) for Equitas Ltd.’s actual or anticipated inability to pay “Original Liabilities” (as defined³⁵⁰) by providing for Equitas Ltd.’s board to (for example³⁵¹): (1) impose the exact proportionate cover equivalent at Equitas Ltd. — including the lack of clarity in RRC 4, Sch. 2, §1’s definition³⁵² of “Retrocession Plan”³⁵³ — of Equitas Re’s RRC 4, Sch. 3 proportionate cover. Equitas Ltd. is a party to RRC 4 in order to undertake to EquitasRe-reinsured SYA participants that it will act in good faith in exercising its own proportionate cover functions.³⁵⁴ The cover’s precipitates are Certified Trigger Events³⁵⁵ and Automatic Trigger Events,³⁵⁶ and the determination³⁵⁷ of a downward multiplier (the Retrocession Rate as defined³⁵⁸) in relation to each of four categories of business (American, Australian, Canadian and Residual). The plan may be used more than once;³⁵⁹ (2) take any action with a view to winding up Equitas Ltd.³⁶⁰ or promoting a Companies Act 1985, s.425 scheme of arrangement³⁶¹ or Insolvency Act 1986, Part I voluntary arrangement.³⁶² This in turn could³⁶³ precipitate an Automatic Reinsurance Trigger Event at Equitas Re;³⁶⁴ (3) exercise any rights it may have to use any other insolvency, moratorium, reorganisation or reconstruction procedure available to it as an authorised insurance company.³⁶⁵

³⁴⁶ RRC 4, Sch. 2, §1, definition of “Residual Business Rate”.

³⁴⁷ See RRC 4, Sch. 3, §6.1, first sentence.

³⁴⁸ RRC 4, Sch. 3, §6.2.

³⁴⁹ *SOD*, p.99: “At the request of the DTI, a plan has been designed to help avoid Equitas Reinsurance or Equitas Ltd., in the event that either becomes unable to pay the 1992 and prior liabilities in full, going into insolvent liquidation or having to promote a scheme of arrangement.”

³⁵⁰ Defined at RRC 5, Sch. 3, §17.

³⁵¹ Relevant provisions are at RRC 5, Sch. 3, §5, 6 and 8.

³⁵² Defined at RRC 5, Sch., 3§17.

³⁵³ See generally RRC 5, §2.4 and *ibid.*, Sch. 3, 5.1.

³⁵⁴ *SOD*, p.99.

³⁵⁵ See RRC 5, Sch. 3, §2.1.

³⁵⁶ See RRC 5, Sch. 3, §2.3.

³⁵⁷ See RRC 5, Sch. 3, §§3.1 and 6.

³⁵⁸ Defined at RRC 5, Sch. 3., §17.

³⁵⁹ RRC 5, Sch. 3, §4.

³⁶⁰ RRC 5, Sch. 3, §8.1(b).

³⁶¹ RRC 5, Sch. 3, §8.1(a); and see *ibid.*, §11.

³⁶² RRC 5, Sch. 3, §8.1(a).

³⁶³ See RRC 4, Sch. 3, §8.1. *Cf.* for example *SOD*, p.99 (“If a proportionate cover plan is implemented by Equitas Limited, Equitas Reinsurance *will* likewise implement a proportionate cover plan”; italics added).

³⁶⁴ See p.239.

³⁶⁵ RRC 5, Sch. 3, §8.1(c).

when proportionate cover at Equitas Ltd. takes effect; suspension of payment

- 4.45** Proportionate cover at Equitas Ltd. takes effect: (1) in relation to a Certified Trigger Event, from the date specified by Equitas Ltd. in its public advertisement — the so-called Interim Retrocession Declaration³⁶⁶ (as defined³⁶⁷). There appears, as at Equitas Re,³⁶⁸ to be the additional step of Equitas Ltd. choosing to “implement” the proportionate cover in the form of a Retrocession Plan; (2) in relation to an Automatic Trigger Event, on and with effect from the date of the relevant liquidation resolution, order or appointment.³⁶⁹ RRC 5 permits Equitas Ltd. to suspend all payments under, and only under,³⁷⁰ its Retrocession Indemnity to Equitas Re pending its board making a decision as to which available option to pursue,³⁷¹ and Equitas Re promises — pending that decision — not to take any step or bring any proceedings against Equitas Ltd.³⁷²

“Retrocession Rate”

- 4.46** RRC 5 provides that Equitas Ltd.’s liability to honour in full its Retrocession Indemnities (as defined³⁷³) to Equitas Re are to be adjusted³⁷⁴ so as to equal the sum of: {Original Liability x Retrocession Rate + any relevant Adjustment Entitlement}.³⁷⁵ The starting point in determining the Retrocession Rate is to categorise³⁷⁶ Equitas Ltd.’s obligations in terms of American Business,³⁷⁷ Australian Business,³⁷⁸ Canadian Business,³⁷⁹ and Residual Business.³⁸⁰ RRC 5 provides for determination of a separate Retrocession Rate for each business category,³⁸¹ and requires the amount of each raw rate to be taken into account when setting the final Retrocession Rate.³⁸² Similar principles apply in relation to Equitas Ltd.’s liability in relation to a Relevant Retrocession Indemnity (as defined³⁸³) on Equitas Ltd.’s liquidation.³⁸⁴ RRC 5 also provides for upward adjustment of payments from Equitas Ltd. to Equitas Re where, during the currency of a retrocession Plan, an upward adjustment is made in a Relevant Retrocession Rate and Equitas Re has itself paid out on a Reinsurance Indemnity at the lower rate.³⁸⁵

³⁶⁶ RRC 5, Sch. 3, §3.2.

³⁶⁷ See the definition in RRC 5, Sch. 3, §17.

³⁶⁸ See RRC 4, Sch. 3, §5.1.

³⁶⁹ RRC 5, Sch. 3, §3.3(i)-(iii).

³⁷⁰ RRC 5, Sch. 3, §9.

³⁷¹ RRC 5, Sch. 3, §9.

³⁷² RRC 5, Sch. 3, §9(a) and (b).

³⁷³ Defined at RRC 5, Sch. 3, §17.

³⁷⁴ And see RRC 5, §2.4.

³⁷⁵ RRC 5, Sch. 3, §3.1(i) and (ii). See *ibid.*, §17’s definition of “Adjustment Entitlement”.

³⁷⁶ See generally RRC 5, Sch. 3, §6.1 *et seq.*

³⁷⁷ Defined at RRC 5, Sch. 3, §17.

³⁷⁸ Defined at RRC 5, Sch. 3, §17.

³⁷⁹ Defined at RRC 5, Sch. 3, §17.

³⁸⁰ Defined at RRC 5, Sch. 3, §17..

³⁸¹ See generally RRC 5, Sch. 3, §6.1(a)(i) (Residual Business Rate); *ibid.*, §(ii) (US Trust Rate); *ibid.*, §(iii) (ECTF Rate) and *ibid.*, §(iv) (Australian Rate).

³⁸² See RRC 5, Sch. 3, §6.1(b)-(d). The provisions are obscure.

³⁸³ Defined at RRC 5, Sch 3, §17.

³⁸⁴ See RRC 5, Sch. 3, §10.1 (subject to the liquidator’s duty to comply with relevant law: *ibid.*, §10.2).

³⁸⁵ See RRC 5, Sch. 3, §13.

Appendix 1.1

Settlement Agreement (RRC 1)

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INTRODUCTORY NOTE

summary

- p.1** RRC 1¹ effected R&R's settlement component between back-office parties — no EquitasRe-reinsured assured-at-Lloyd's was party to or is bound by it — such as (for example) such RRC 4-compulsorily EquitasRe-reinsured SYA participants as optionally chose to enter into it,² Equitas Re,³ the Corporation,⁴ members of the Council,⁵ and relevant members' agencies,⁶ managing agencies,⁷ Lloyd's brokers⁸ and others.⁹ In particular, RRC 1 effected¹⁰ (among other things) the permanent comprehensive back-office release of every RRC 1 Accepting Name,¹¹ and the per-

¹ See for example *Lloyd's v Leighs* {1a} [1997] CLC 759 (Colman J); *ibid.* {2a} [1997] CLC 1012 (Colman J); *ibid.* {1b & 2b} [1997] CLC 1398 (CA); *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA); *Price and Price v Lloyd's* [2000] Lloyd's Rep IR 453 (Colman J); *Lloyd's v Jaffray* {1} [1999] Lloyd's Rep IR 182 (Colman J); *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J; appeal dismissed July 26, 2002).

² See for example RRC 1, recitals (A), (C), (D), (E), (G), §§3, 4.

³ See for example RRC 1, recital (A), §§4, 6.

⁴ See for example RRC 1, recital (A), §§3, 4.

⁵ See for example RRC 1, recital (A), §4.

⁶ See for example RRC 1, recital (A), §3, 4, 5.

⁷ See for example RRC 1, recital (A), §3, 4, 5.

⁸ See for example RRC 1, recital (A), §§3, 5.

⁹ See for example RRC 1, recital (A), §§3, 4.

¹⁰ RRC 1 is subject to attack for fraudulent misrepresentation: see *ibid.*, §12.2. Relevant calculations and procedure entailed in avoiding RRC 1 would be very considerable.

¹¹ See for example RRC 1, §§6.4 (release by Equitas Re from all obligation to provide any further EquitasRe-reinsurance premium); 5.1 (release by his relevant members' agency from all obligation to provide any relevant back-office funds),

manent reciprocal release from various “Claims”¹² of Accepting Names¹³ — both as such¹⁴ and as SYA participants¹⁵ — of “Underwriting Agents”,¹⁶ “Underwriting Agent Persons”,¹⁷ “Auditors”,¹⁸ “Auditor Persons”,¹⁹ “Brokers”,²⁰ “Broker Persons”,²¹ and numerous others²² including (for example²³) the Corporation,²⁴ members of the Council,²⁵ AUA 9,²⁶ Citibank NA,²⁷ Royal Trust Corporation of Canada,²⁸ and also Equitas Re²⁹ for itself and as agent for and on behalf of each other member of the Equitas Group.³⁰ RRC 1 also settles³¹ some other of Equitas Re’s own relevant personal claims. Standard-form, uniform and not-negotiable, its taking effect was conditional³² on Equitas Re executing RRC 4,³³ and on it and Equitas Ltd. accepting their respective RRC 4, §3 reinsurance and RRC 5, §2 retrocession obligations.³⁴

background

SYA participants’ successful lawsuits before and after LSO 1

- p.2 The summer of 1992 saw SYA participants react adversely to unusually poor SYA results, and increasingly menacing liabilities imported by conventional RTC engineered by their managing agencies. Unprecedented minority agitation³⁵ included unprecedentedly pointed (if not always soundly reasoned) allegations of chronic self-regulatory³⁶ and transactional fraud and other ac-

ibid. (release by each of his relevant managing agencies *ditto*); 3.3-3.4 (release by the Corporation from all obligation to make any relevant reimbursement to the Central Fund).

12 The RRC 1, Sch. 1, §1 definition of “Claim” expressly includes fraud (on which see also RRC 1, recitals (G) and (H)).

13 As defined at RRC 1, Sch. 1, §1.

14 See for example RRC 1, §§4.2, 4.5, 4.7, 4.14.

15 See for example RRC 1, §§4.5, 4.8, 4.9, 4.10.

16 At RRC 1, §4.5.

17 At RRC 1, §4.5.

18 At RRC 1, §4.5.

19 At RRC 1, §4.5.

20 At RRC 1, §4.6.

21 At RRC 1, §4.6. So far as concerns Equitas Re personally, see the special provisions concerning “Equitas Claims” against Brokers, see RRC 1, §6.2.

22 See RRC 1’s list of parties, and (for example), RRC 1, §4.5 (settlement of relevant claims against “Underwriting Agents”, “E&O Insurers”, “Lloyd’s”, “Equitas”, and relevant others); §4.6 (*ditto* “Brokers”); §4.7 (*ditto* in relation to “Other Rights” against relevant parties); §4.8 (*ditto* re “Substitute Agent Payment Claims”), and §§4.9 and 4.10 (relevant claims against Citibank and Royal Trust).

23 See the list at RRC 1, parties. And see generally RRC 1, §6; *ibid.*, §12.7.

24 At RRC 1, §4.5.

25 At RRC 1, §4.5 read with *ibid.*, Sch. 1, §1 definition of “Lloyd’s Persons”, §(b).

26 At RRC 1, §4.8.

27 At RRC 1, §4.9.

28 At RRC 1, §4.10.

29 See principally RRC 1, §6.

30 RRC 1, parties; *ibid.*, §4.5; *ibid.*, Sch. 1, §1, the various “Equitas” definitions.

31 See RRC 1, §§6.1 and 6.2.

32 See generally for example RRC 1, §2.2.

33 See RRC 1, §2.1(c).

34 See for example RRC 1, §2.1(d) and (e) respectively.

35 *Viz.:* (1) *R v Lloyd’s ex parte Briggs*, unreported May 22, 1992 (Beldam LJ and Laws J); [1993] 1 Lloyd’s Rep. 176 (QB Divisional Court; Leggatt LJ and Popplewell J). In *R v Insurance Ombudsman ex parte Aegon Life Assurance Ltd.* [1995] LRLR 101, 104, the applicant argued that *Briggs* had “clearly” been wrongly decided; (2) the requisitioning of a Corporation EGM (by two activists calling themselves “The EGM Initiative”) at which various resolutions apparently constructive to Members were tabled (all vigorously opposed by self-regulators-at-Lloyd’s, and all lost).

36 On self-regulatory fraud at Lloyd’s, long suspected by some Members, see for example *Lloyd’s v Jaffray* {2b} (CA, July 26, 2002) on appeal from *ibid.* {2a} [2000] CLC 725 (Cresswell J).

tionable misconduct at Lloyd's, an application for judicial review,³⁷ a hostile Corporation EGM,³⁸ and the nascence of some of what became the largest and most influential Members' and SYA participants' action groups.³⁹ Increasingly keen to quell discontent, self-regulators-at-Lloyd's responded with the Lloyd's Legal Disputes Settlement Initiative.⁴⁰ In December 1993, following unfavourable court rulings on elementary principle,⁴¹ self-regulators-at-Lloyd's — made aware through the Kerr Panel⁴² of pandemic relevant actionable misconduct by members' and managing agencies (all licensed, vouched for,⁴³ and supervised by self-regulators-at-

³⁷ *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176 (QB Divisional Court).

³⁸ See fn. 35.

³⁹ All the major pre-R&R offensive and defensive English litigation brought by Members — particularly in relation to actionable active underwriting, portfolio selection, and actionable self-regulation — was coordinated and funded by Members with common interests congregated in litigation action groups. Action groups comprising Members variously configured became significant enough through successful litigation to bring about the failure of LSO 1, achieve representation on important committees, the Council and the group of seven Equitas Trustees, and require separate R&R settlement agreements (principally forms of RRC 3). Various consolidating or policy-oriented "super"-groups emerged, comprising the chairmen of the largest action groups.

⁴⁰ LSO 1, p.8.1, §1.

⁴¹ *Henderson v Merrett Syndicates Ltd.* {1b} [1994] 2 Lloyd's Rep. 468 (CA; December 13, 1993; and see January 6, 1994 order) on appeal from *ibid.*, {1a} [1994] 2 Lloyd's Rep. 193 (Saville J; October 12, 1993; and *ibid.*, November 8, 1993 order). Elementary agency law was strongly disputed by members' and managing agency defendants: see for example relevant defence submissions at *Henderson v Merrett Syndicates Ltd.* {1c} [1995] 2 AC 145 (HL; July 25, 1994), *ibid.*, {1b} [1994] 2 Lloyd's Rep. 468 and *ibid.*, {1a} [1994] 2 Lloyd's Rep. 193; *Deeny v Gooda Walker Ltd.* [1996] LRLR 183 (Phillips J); *Arbuthnott v Feltrim Underwriting Agencies Ltd.* [1995] CLC 437 (Phillips J) (both notable for the specious notion of acceptable multi-YA losses as part of a competent managing agency's preconceived plan). Self-regulators-at-Lloyd's and the managing agency community at Lloyd's appear until judgment in *Henderson*, above, to have been largely unaware of elementary law of agency, and until *Deeny* and *Arbuthnott* to have been unwilling to concede its application to them. Obduracy was particularly evident in the 1980s. See for example Lloyd's disciplinary proceeding *In the Matter of Denby and Posgate*, Case No.8403/4, §25, p.0023, the evidence of the Lloyd's broker who arranged a funding policy held to have been improper: "[T]he assumption that one Syndicate should not benefit beyond that Syndicate's contribution ... does not, in my experience, accord with market practice. In my opinion there was nothing improper about [it]." The disciplinary committee reacted, at *ibid.*: "While this view appears to us to be astonishing in its implications, we must accept on the evidence before us that it was conscientiously held." See also General Meeting of Members of Lloyd's, Thursday 28th June 1984; Statement by Mr. Peter Miller, Chairman, p.4. "[I]t has been made very clear to me that underwriters believed — and still believe — that when they entered into these arrangements the policies were effected as valid reinsurance for proper commercial reasons in the best interests of the members of the syndicates they managed." The more senior and prominent the defendant, the more the existence and ambit of elementary legal duties of managing agency personnel to their SYA participant principals appears to have been disputed. See for example *In the Matter of Grattan-Bellew, Parry, Raven, Nelson & Stratton*, Case No. 8601/4, Section 1, §226, p.133: the disciplinary committee "noted that ... Mr. Nelson [a senior self-regulator-at-Lloyd's] did not accept that ordinary business ethics provided the relevant standards by which [his] conduct was to be judged". *In the Matter of Green and Valentine*, Case No.8606/1, Findings of Fact [etc.], §58: "The Defendants [one of which was Sir Peter Green, Chairman of Lloyd's between 1980 and 1983] admitted that they were subject to these duties, but did not admit (a) what was the precise scope of the duties[;] (b) whether the duties were owed to Janson and Crescent, or to Lloyd's generally as professional duties, or to the Names." Counsel for the second defendant contended that: (1) there was no caselaw to support the alleged duties; (2) it was a well established that, absent special circumstances, a company director owes no fiduciary duties to shareholders (not the position of a SYA participant); (3) company directors owe no fiduciary duties to one to whom the company stands in the relation of agent and fiduciary; (4) even if it were arguable that the second defendant owed fiduciary duties to the affected SYA participants, the point was "so unclear as to make it inappropriate to reach a conclusion based on the criminal standard of proof": *ibid.*, §62. As to the front office, see incidentally *North and South Trust Company v Berkeley* [1970] 2 Lloyd's Rep. 467, 480 (Donaldson J; "The watch words of the business of insurance are uberrimae fidei and it is astonishing that Lloyd's should have evolved a practice which renders the maintenance of the utmost good faith so fraught with difficulty.").

⁴² And see *One Lime Street*, July 1993, p.5 ("Legal disputes panels appointed"); *ibid.*, August 1993, p.1 ("Resolving the disputes").

⁴³ General Meeting of Members of Lloyd's, Wednesday 26th June 1985; Statement by Mr. Peter Miller, Chairman, p.3-4:-

I now return to the general question which I have posed as to whether a member or prospective member of Lloyd's can trust the system which now regulates the market in which they participate — or, to put it more bluntly: "Could it happen to me?" At once I must start by saying that, trading as we do on the basis of individual and unlimited liability, there will always be, as there has always been, a possibility of financial disaster from underwriting losses. But surely at Lloyd's we deal in the risk of probabilities, rather than the risk of possibilities. ... I believe that the Council of Lloyd's has now evolved a regulatory system which is both appropriate to the modern day world and is also one in which the current members of Lloyd's and those seeking membership can fully place their trust. ... These measures I have listed and many other reforms add up, in my view, to a modern and efficient system of regulation in which Names may readily place their trust.

Lloyd's) towards increasingly contrary Members — published LSO 1 (with appended LSO 1 Agreement), asseverating that its terms could not be improved. A majority of relevant SYA participants, to some extent moderated by the committees of their litigation action groups, decisively rejected LSO 1 and (many on the verge of insolvency⁴⁴) continued to prosecute their claims against relevant members' and managing agencies (*ditto*⁴⁵), precipitating a "flood of complex litigation, enough to occupy the exclusive attention of all the Judges available to the [Commercial] Court for a long period".⁴⁶ Phillips J's seminal judgment in *Deeny v Gooda Walker Ltd.*⁴⁷ and an increasingly predictable flow of subsequent similar decisions⁴⁸ presaged the end of business as usual at Lloyd's, notwithstanding the consistent failure of US Members' suits in US federal court⁴⁹ on the General Undertaking's forum selection and governing law clauses.

See similarly General Meeting of Members of Lloyd's, Thursday 28th June 1984; Statement by Mr. Peter Miller, Chairman, p.1: self-regulators at Lloyd's had "done all we can to ensure the competency of the agents, [and] it is up to the Name to choose his agent with care and to look to that agent to protect his further interests."

⁴⁴ See *Cox v Bankside Members Agency Ltd.* [1995] 2 Lloyd's Rep. 437, 459 (Bingham MR).

⁴⁵ See *Cox v Bankside Members Agency Ltd.* [1995] 2 Lloyd's Rep. 437, 456 (Bingham MR). The disposition by some members' and managing agencies of their personal funds was increasingly the object of suspicion among relevant SYA participants.

⁴⁶ *Cox v Bankside Members Agency Ltd.* [1995] 2 Lloyd's Rep. 437, 458 (Bingham MR). See the summary at *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156, 160 (Hobhouse LJ). For a picture shortly before R&R, see for example Cresswell J's April 12, 1995 statement, *The Lloyd's Litigation — Report on the progress and management of the Lloyd's Litigation*. See similarly the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991; "dockets ... continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; ... exhaustion of assets threatens and distorts the process, and future claimants may lose altogether") quoted in J. D. Aldock and R. M. Wyner, *The Use of Settlement Class Actions to Resolve Mass Tort Claims after Amchem Products, Inc. v Windsor* in 33 Tort & Ins. LJ 905, 908 (1998); and see *In re Asbestos Products Liability Litigation (No. VI)*, 771 F.Supp. 415, 419 (JPML, 1991).

⁴⁷ [1996] LRLR 183 (Phillips J; October 4, 1994), preceded by *Henderson v Merrett Syndicates Ltd.* {1c} [1994] 2 Lloyd's Rep. 468 (HL; July 25, 1994).

⁴⁸ See the summary at Appendix 1 at *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J; appeal dismissed July 26, 2002), and see Kerr Panel Evaluation for the extent of actionable misconduct. Relevant cases include *Lark v Outhwaite* [1991] LRLR 1; *Hiscox v Outhwaite* [1991] LRLR 93; *Boobyer v David Holman & Co Ltd. and Lloyd's* [1992] 2 Lloyd's Rep. 436; *Ashmore v Lloyd's* [1992] 2 Lloyd's Rep. 1; *Boobyer v David Holman & Co Ltd. and Lloyd's (No. 2)* [1993] 1 Lloyd's Rep. 96; *Napier & Ettrick v R. F. Kershaw Ltd.* [1993] 1 Lloyd's Rep. 10; *Ashmore v Lloyd's (No. 2)* [1992] 2 Lloyd's Rep. 620; *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176; *Napier & Ettrick v Hunter* [1993] AC 713; *Lloyd's v Morris* [1993] LRLR 217; *Lloyd's v Canadian Imperial Bank of Commerce* [1993] 2 Lloyd's Rep. 579; *Feltrim and Gooda Walker actions* [1994] LRLR 168 [1996] LRLR 135; *The Merrett, Gooda Walker and Feltrim Cases* [1994] 2 Lloyd's Rep. 193; *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.* [1995] 2 Lloyd's Rep. 197; *The Merrett, Gooda Walker and Feltrim Cases* [1994] 2 Lloyd's Rep. 468; *Sword-Daniels v Pitel; Brown v KMR Services Ltd.* [1994] LRLR 10; *Arbuthnott v Fagan* [1996] LRLR 143; *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.* [1995] LRLR 20; *The Merrett, Feltrim and Gooda Walker Cases* [1995] 2 AC 145; *Deeny v Gooda Walker Ltd.* [1996] LRLR 183; *Lloyd's v Clementson* [1995] LRLR 307; *Deeny v Gooda Walker* [1995] STC 439; *Cox v Bankside Members' Agency Ltd.* [1995] 2 Lloyd's Rep. 437; *Aikens v Stewart Wrightson Members Agency Ltd.* [1995] 2 Lloyd's Rep. 618; *Deeny v Gooda Walker Ltd.* [1995] LRLR 117; [1996] LRLR 176; *Caudle v Sharp* [1995] LRLR 389; *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.* [1996] 1 AC 102; *Cox v Bankside Members Agency Ltd.* [1995] 2 Lloyd's Rep. 437; *Deeny v Gooda Walker Ltd (No.3)* [1996] LRLR 168; *Brown v KMR Services Ltd.* [1995] LRLR 241; *PCW Syndicates v PCW Reinsurers* [1995] LRLR 373; *Cox v Deeny* [1996] LRLR 288; *Deeny v Gooda Walker Ltd.* [1995] LRLR 361; [1996] LRLR 109; *Marchant & Elliott Underwriting Ltd. v Higgins* [1996] 1 Lloyd's Rep. 313; *Henderson v Merrett Syndicates Ltd.* [1997] LRLR 265; *Deeny v Walker* [1996] LRLR 276; *Marchant & Elliott Underwriting Ltd. v Higgins* [1996] 2 Lloyd's Rep. 31; *Arbuthnott v Feltrim Underwriting Agencies Ltd.* [1996] CLC 714; *Henderson v Merrett Syndicates Ltd.* [1997] LRLR 247; *Deeny v Gooda Walker Ltd.* [1996] LRLR 109; *Berriman v Rose Thomson Young (Underwriting) Ltd.* [1996] LRLR 426; *Judd v Merrett* [1997] LRLR 21; *Lloyd's v Clementson* [1997] LRLR 175; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313; *Axa Reinsurance (UK) Plc v Field* [1996] 2 Lloyd's Rep. 233; *Hill v The Mercantile & General Reinsurance Co Plc* [1996] LRLR 341.

⁴⁹ See for example *Richards v Lloyd's*, 135 F.3d 1289 (9th Cir. *en banc* 1998), *Roby v Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 385 (1993); *Bonny v Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied* 114 S. Ct. 1057 (1994). *Leslie v Lloyd's* and *Haynsworth v Lloyd's* achieved rare success at trial but were overturned at *Haynsworth and Leslie v Lloyd's*, 85 F.3d 625 (5th Cir. 1996).

self-regulatory and Market need to prevent further litigation

p.3

After LSO 1's failure, self-regulators-at-Lloyd's — noting the Central Fund's⁵⁰ frailty and venturing to perceive a "change in the climate within the Society"⁵¹ — increasingly urgently⁵² sought a mechanism stopping⁵³ all further relevant successful litigation by relevant SYA participants, who, in their increasing determination to (among other things) extricate themselves from conventional inward-RTC's deleterious infiltration effects, were beginning to turn their attention from members' and managing agencies with increasingly insubstantial capital and income and with little or no relevant net⁵⁴ compulsory e&o cover (much of it sold and or reinsured by plaintiff SYA participants) to relevant SYA participants' auditors⁵⁵ and self-regulators-at-Lloyd's.⁵⁶ The settlement mechanism would particularly need to appease current and prospective plaintiff SYA participants financially, including by (for example): (1) distributing or appearing to distribute widely among appropriate SYA participants damages, relevant e&o cover and other money in order to avoid plaintiff SYA participants' "first past the post" "dash for cash";⁵⁷ (2) appearing

⁵⁰ See for example *SOD*, the Corporation's then CEO's July 30, 1996 cover letter, p.ii (and self-regulators-at-Lloyd's had expressed themselves similarly before that):-

To date, the Society has been able to deal with the non-payment of members' obligations through the application of the Central Fund. As at 30 June 1996, the Central Fund's net assets ... stood at approximately £505 million. In the absence of the successful implementation of the reconstruction plan, the Central Fund might not be able to meet the anticipated cash requirements arising out of members' shortfalls and the Society would be unlikely to meet the DTI's members' level solvency test.

Note the erroneous use of "Society". And see *S&M*, §57-59 (p.21). *Ibid.*, §57:-

[E]ven if Lloyd's were able to pass the solvency test in August 1996, there must be doubt as to how long the Council will be able to continue to use the Central Fund to cover the liabilities of defaulting Names. All Names would be unwilling to replenish it and many Names unable to do so. The Council must also pay regard to the capacity of the Central Fund to cover the liabilities of Lloyd's itself, which are substantial (for example, in respect of Lioncover ...).

⁵¹ See *One Lime Street*, December 1994, p.1 ("New settlement proposed"; "A change in the climate within the Society has enabled the Council to review the possibility of a further settlement offer and to suspend the amendments to premiums trust deeds"), quoting the Corporation's then CEO: "[R]ather than working centrally on an offer, a better methodology was to build consensus gradually with all the parties involved." For a pre-R&R Lloyd's-side perspective, see for example P. K. Demmerle (an attorney at the Corporation's US attorneys LeBoeuf, Lamb, Greene & MacRae LLP), *An Overview of Lloyd's Plan* in *Journal of Reinsurance*, vol. 3, no. 1, Fall 1995, p.72 *et seq.*

⁵² For one perspective, see for example *S&M*, §11 (p.3):-

One of the striking features of the Lloyd's system is its sheer complexity. In particular, the extent to which the reinsurance to close ... system and the web of inter-syndicate insurances and reinsurances within the market lead to every Name being dependent on every other is difficult to grasp and even more difficult to quantify. It is this interdependence which justifies the use of the Central Fund to support the system, which in turn adds to the overall complexity. It is this complexity which both plaintiffs and defendants have been able to turn to their advantage in the litigation which has led to the circumstances in which Lloyd's now finds itself. The result has been to persuade Lloyd's to make a second attempt to find a solution It is important not to lose sight of the extent to which Names are dependent upon each other and of the extent to which the complexity of the Lloyd's system makes it so much easier ... to continue to create problems than to resolve them.

⁵³ See for example January 28, 1994 letter from the Chairman of Lloyd's to Members, p.2:-

Our aim is to bring recompense to members who have suffered through the alleged negligence or incompetence of their appointed representatives. This might be achieved by a series of court decisions spread over the next few years. Our aim has been to achieve for all members of the Society, whether litigating or not, a much fairer and quicker solution than would emerge if we let events take their course.

And see *SOD*, the then Chairman of Lloyd's July 30, 1996 cover letter, p.i:-

The reconstruction plan has been designed to settle the litigation affecting the Lloyd's market and to provide affordable 'finality' to the many Names trapped on open years of account.

⁵⁴ On the sale of e&o insurance, permitted and apparently to some extent encouraged by self-regulators-at-Lloyd's, to members' and managing agencies by SYA participants, whom the cover was supposed to protect and to whom it was represented by self-regulators-at-Lloyd's and others as actually protecting, see for example *Cox v Bankside Members Agency Ltd.* [1995] 2 Lloyd's Rep. 437 (CA).

⁵⁵ See for example *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265 (Cresswell J).

⁵⁶ See for example *Lloyd's v Clementson* {2} [1997] LRLR 175 (Cresswell J); *ibid.* {1b} [1995] LRLR 307 (CA), and the post-R&R fraud counterclaims in *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J; appeal dismissed July 26, 2002). Earlier pre-R&R jurisprudence was not encouraging on the liability of self-regulators-at-Lloyd's to Members: see for example *Ashmore v Lloyd's (No.2)* [1992] 2 Lloyd's Rep. 620 (Gatehouse J; the Corporation had no duty of care to actual or prospective Members); *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176 (QB Div. Ct.; self-regulators-at-Lloyd's not susceptible to judicial review; and see May 22, 1992 unreported (QB Div. Ct.); cf. *R v Lloyd's Regulatory Board ex parte Macmillan and Thompson* [1995] LRLR 485 (Macpherson J)).

⁵⁷ See for example *Cox v Bankside Members Agency Ltd.* [1995] 2 Lloyd's Rep. 437 (CA).

to ordain a monetary limit to every relevant SYA participant's relevant insurance liabilities — an idea, absent from LSO 1, to be called in LSO 2 “finality”;⁵⁸ (3) releasing them from entrapment in SYAs the collectivised accounts of participants on which could not close because of inability to quantify relevant liabilities (a matter to which Neville Russell had drawn the Old Committee's attention in 1982⁵⁹).

LSO 2

generally

- p.4 In May 1995, the Council published its first formal R&R proposal,⁶⁰ reasoning that once relevant SYA participants had been appeased, the Lloyd's enterprise could, should and would continue⁶¹ to trade (the “best interests of the Society” argument⁶²) with such of the same members' and managing agencies and their personnel as survived R&R, the whole under substantially the same self-regulatory regime. After further consultation, and anticipating members' and managing agencies and others agreeing⁶³ to make certain payments⁶⁴ — including with anticipated “profit

⁵⁸ See p.168.

⁵⁹ See the discussion at for example *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265 (Cresswell J); *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J).

⁶⁰ See for example *R&R I* etc. R&R's evolution is evidenced in, for example, *R&R I* through *R&R 14*.

⁶¹ See for example the April 22, 1996 letter from the manager of the Corporation's North America Dept. to Members attaching *Reconstruction and Renewal: Implications of Run-off. Implications*, p.1:-

The Lloyd's reconstruction plan is predicated on the assumption that Lloyd's will continue to trade. The bulk of the settlement offer, currently amounting to approximately US\$4.3 billion has been put forward by parties that would be unwilling or unable to contribute if Lloyd's were not to continue trading. In particular ..., the resources of the Lloyd's Central Fund would not be available if Lloyd's were to go into run-off: they would need instead to be preserved to meet liabilities to creditors such as Lioncover, Centrewrite and Hardship Names.

⁶² As at for example *SOD*, July 30, 1996 cover letter from the then Chairman of Lloyd's, second unnumbered page.

⁶³ See for example *SOD*, the Corporation's then CEO's July 30, 1996 cover letter, p.iii (“This settlement offer is being made to Names on the basis of the funding commitments which have been received by the Council from the various contributing parties”). The contributions were made on August 9, 1996: see generally RRC 0, *Per ibid.*, recitals:-

(B) Claims have been made against certain Agents and further claims could be made in the future. Without admitting liability, the Agents wish an offer to be made in settlement of any legal liability they have, or may subsequently be shown to have, in respect of those claims. In consideration, the Agents will, inter alia, receive the benefit of certain waivers and releases set out in the Settlement Agreement. ... (D) The Agents have agreed, on and subject to the terms of this Agreement, to the making of the Settlement Offer by Lloyd's.

Per RRC 0, §1.1, “Claim” means:-

a claim, potential claim, counterclaim, claim by way of enforcement of judgment, award or order of any kind (including as to interest and costs), right of appeal, claim by way of contribution, right of set off, indemnity, cause of action, right or interest of any kind whatsoever, whether known or unknown, suspected or unsuspected, whether arising in contract, tort, equity, fraud, as a consequence of wilful, reckless or negligent conduct, or of any fiduciary, statutory, regulatory or any other duty, or otherwise, howsoever and whenever arising, and in whatever capacity and jurisdiction[.]

And see contemporaneously for example the Corporation's then CEO's July 18, 1995 letter to the chairman or senior partner of members' and managing agencies, ref. X881:-

Dear Chairman/Senior Partner — It has become apparent that there is still a degree of confusion amongst Agents as to the precise nature of contributions being sought from the Agency community in respect of the Lloyd's Reconstruction and Renewal Plan. The purpose of this letter is to provide clarification as to what contributions are anticipated and how it is intended that they will be calculated. As outlined in the Lloyd's Reconstruction and Renewal document, contributions from Agents are being sought in two separate ways: Towards the £2.8 billion settlement package offer, and Towards the strengthening of central finances[.]

£2.8 Billion Settlement Offer — Lloyd's is seeking to assemble a litigation settlement fund, which we are confident will amount to at least £800 million. Contributions to this fund, which will be in consideration for an out-of-court settlement of actual and potential litigation, are being sought from all parties with a direct interest in the achievement of a litigation settlement — principally E&O underwriters, Lloyd's Agents, non-Lloyd's E&O insurers, auditors and brokers. Work is continuing to finalise an equitable basis to establish the level of contributions to this fund from Agents. In broad terms, we are seeking to quantify the likely financial impact on Agents, after taking into account their available E&O cover, were the litigation to continue to run its course. It is intended that this quantification will provide the basis for calculating the contribution to be sought from each affected Agent. The data necessary to develop this approach are currently being assembled and various aspects of the methodology are in the process of being finalised. At the earliest opportunity, the principles involved will be discussed with the Agency community, prior to the finalisation of the contributions themselves. Any payments already made by Agents under Court judgments or by way of out-of-court settlements will be taken into account.

Strengthening Central Finances — Over the next twelve months, we aim to supplement the existing central finances of the Society, as part of the Reconstruction and Renewal Plan, by around £850-900 million, of which £200 million is intended to

commission”⁶⁵ contractually deducted from plaintiff SYA participants’ anticipated “profits” — self-regulators-at-Lloyd’s published LSO 2 in *SOD*.⁶⁶ Allegedly offering a settlement “worth” approximately £3.2bn,⁶⁷ and Members in Corporation EGM having previously approved some of its elements in various class meetings, LSO 2 was a qualified⁶⁸ advance on LSO 1, especially in proposing “qualified finality”⁶⁹ for each EquitasRe-reinsured SYA participant. Representations made by self-regulators-at-Lloyd’s concerning R&R “finality” were ambiguous.⁷⁰ Independent evaluation tended to support RRC 4’s “conditional finality” as being the only feasible option in the circumstances,⁷¹ other options including reconfiguring relevant insurance contractual liabilities by an Insurance Companies Act 1982, Sch. 2C transfer of business;⁷² death,⁷³ and avoidance

be provided by Agents. A committee of the LUAA, chaired by Brian Pomeroy, is currently working to recommend an equitable basis for determining how this contribution should be allocated across Agents[.]

Linkage of Contributions — Whilst the two contributions are nominally separate and the exercises to establish them are proceeding independently, it is recognised that, in the aggregate, a test of affordability must be applied. For this reason, the results of both working parties will be analysed in combination, which may result in adjustments to either or both sets of contributions prior to finalisation.

⁶⁴ See generally *SOD*, p.31-40, describing (among others) special Central Fund contributions (*ibid.*, p.31-32); £225m from members’ and managing agencies (*ibid.*, p.32-33); £800m from e&o insurers (*ibid.*, p.33; some were SYA participants, or were outwardly reinsured by them); £116m from auditors Arthur Andersen, Coopers & Lybrand, Ernst & Young, Littlejohn Frazer, and Neville Russell (*ibid.*, p.33); £100m from Lloyd’s brokers (*ibid.*, p.33-34); and receipts from the Corporation’s sale of Lloyd’s of London Press, the sale and leaseback of the 1986 Lime Street building, and the then proposed mortgage of the 1958 Lime Street building (*ibid.*, p.34-5); plus a then-contemplated £300m syndicated loan repayable by Members (*ibid.*, p.35-6).

⁶⁵ See generally *SOD*, p.32-33. Fortunately for the Lloyd’s enterprise, the R&R exercise coincided with a relatively prosperous juncture in the insurance profitability cycle.

⁶⁶ See for example RRC 1, §3.1 (“Lloyd’s agrees to apply the benefits of the Combined Litigation Settlement Funds and Debt Credits, or procure that such benefits are applied, in accordance with the terms of the Settlement Offer Document”).

⁶⁷ *SOD*, p.1.

⁶⁸ See for example *SOD*, July 30, 1996 cover letter from the Corporation’s then CEO, p.vi:-

The reconstruction plan has been designed to settle the litigation affecting the Lloyd’s market and to provide affordable ‘finality’ to the many Names trapped on open years of account. By its nature the plan involves a very large measure of compromise. We acknowledge that the plan does not provide a perfect solution to all of the problems arising from the £8 billion of losses incurred between 1988 and 1992 and that a number of risks remain. Names are advised to consider carefully the information contained in this document (and the documents which accompany it), including certain benefits and risks of the reconstruction plan as set out in Chapter 13, in order to make a balanced assessment of the settlement offer.

⁶⁹ See for example the summary at the Corporation’s February 12, 1996 press release (LL13/96):-

Lloyd’s publishes today ... proposals for allocating its £2.8 billion settlement offer designed to end litigation and cap the cost of members’ liabilities at an affordable level. Under the proposals, no member will pay more than £100,000 in excess of the member’s existing funds at Lloyd’s in order to achieve a final resolution of 1992 and prior liabilities.

⁷⁰ See p.168.

⁷¹ See for example *S&M*, §40 (p.14).

⁷² See *SOD*, p.115:-

Lloyd’s explored the use of a statutory novation in detail but was obliged to conclude that the relevant statutory provisions could not be made to operate. In particular, such a transfer would not effect the transfer of the benefit of Names’ reinsurance which would be fundamental to reinsurance to close of Names’ liabilities. In order to transfer the benefit of such reinsurance to Equitas Reinsurance, it would have been necessary to obtain the separate consent of each reinsurer to the proposed transfer to Equitas Reinsurance (which was not feasible given the thousands of reinsurers that would have been involved). In addition, insurance laws throughout the US permit novations to occur only if the regulator orders it in the context of a rehabilitation or liquidation proceeding, or with the express consent of all of the policyholders. Lloyd’s was, therefore, forced to reject a statutory transfer as a means of achieving the reinsurance into Equitas.

See also *S&M*, §26 (p.8):-

[I]t seems likely that such a transfer would not extend to Names’ corresponding assets i.e. the benefit of [outward] reinsurance. In other words, it would not be possible to effect a statutory transfer of syndicates’ reinsurance programmes into Equitas without the consent of each and every reinsurer. The DTI has confirmed that this is their interpretation of the legislation. Lloyd’s is of the view that it would not be practicable to obtain the consent of every reinsurer. ... [T]he risk of losing the benefit of all reinsurances is too great to justify pursuing this possibility unless the consent of all reinsurers could be obtained.

⁷³ Considered at *S&M*, §§27-28 (p.9) and *ibid.*, §§78-83 (p.30-32). *Ibid.*, §27:-

[P]olicyholder claims do not cease or disappear if the original Names have died or become bankrupt. Their estates remain liable and entitled to the benefit of the indemnity from the Names on the succeeding syndicate pursuant to the RITC contract. It would be legally possible for the claiming policyholder to force a reopening of the relevant estates and a claim under the relevant RITC contract.

This wholly misstates the ordinary course of business at Lloyd’s. A conventionally outward-RTCed SYA participant, whether or not dead, is never liable on outward-RTCed business, and never makes a claim on the RTC contract.

of relevant insurance contracts for fraud,⁷⁴ material non-disclosure,⁷⁵ or because of some relevant EU illegality.⁷⁶ The offer was accompanied by a letter from the then Chairman of Lloyd's⁷⁷ advising offeree SYA participants to consider it carefully⁷⁸ and recommending⁷⁹ acceptance, noting that if R&R failed, the Council would be required to reconsider whether the Lloyd's enterprise was still a "going concern" and if not to "put the Society into run-off".⁸⁰ US Members were offered special financial emollients.⁸¹

⁷⁴ Considered at for example *S&M*, §29 *et seq.* (p.9-12).

⁷⁵ Considered at for example *S&M*, §35-38 (p.12-13) in the context of Equitas Re's presumed right to avoid for material non-disclosure (in the event, see RRC 4, §3.9). *Ibid.*, §35 (p.12):-

The right to avoid a policy on grounds of material non-disclosure is a normal attribute of the policy which under R&R should be inherited by Equitas from each Name ... it will be in the interests of Equitas and ... all Names to investigate carefully whether any such rights arise and to assert them vigorously if they do.

⁷⁶ Considered at for example *S&M*, §39 (p.13-14).

⁷⁷ *Ibid.*:-

The Council has always believed that negotiation leading to settlement rather than litigation is the only route offering the greatest chance to members of a fair resolution of their disputes. I am encouraged that many others in our community now feel the time is appropriate for a further determined effort to be made. For this reason, the Council has decided to postpone implementation, for a period, of its strategy on PTDS in order to allow the best chance for the negotiated settlement to be achieved.

And see generally, later, *One Lime Street*, June 1995, p.1 etc. ("Radical plan for Lloyd's unveiled").

⁷⁸ See for example *SOD*, July 30, 1996 cover letter from the Corporation's then CEO, pp.i, vi.

⁷⁹ See for example *SOD*, July 30, 1996 cover letter from the then Chairman of Lloyd's, unnumbered second page ("The Council is unanimous in the view that this final settlement offer is in the best interests of the Society as a whole. I commend it to you"). And see *SOD*, p.8 ("Recommendation"):-

The Council has a duty to exercise its powers reasonably and in good faith in what the Council believes is in the best interests of the Society. In reaching the decision to implement the Reconstruction and Renewal plan, the Council has had regard to all relevant interests, including those of the different categories of members, agents, brokers and policyholders. The Council's deliberations inevitably involved balancing these interests and recognising that some compromises are needed by some constituencies for the sake of what the Council believes is in the best interests of the Society as a whole. The Council has tested the Reconstruction and Renewal plan against the alternative of the Society ceasing to trade and remains convinced that this alternative would inflict severe damage and uncertainty on all categories of members and would not result in members being able to avoid their liabilities. The Council has taken financial advice in relation to the Reconstruction and Renewal plan from Lazard Brothers, whose letter is set out in Appendix 4. Throughout the process, the Council has taken legal advice from Freshfields. The Council is convinced that the Reconstruction and Renewal plan is in the best interests of the Society as a whole. The plan can only be implemented if the Settlement Agreement becomes unconditional. Accordingly, while each Name must consider his own individual circumstances and is urged to seek the advice of his professional advisers, the Council recommends acceptance of the settlement offer.

And see *ibid.*, p.150:-

The Council has concluded that the Reconstruction and Renewal plan is better than the alternative of allowing the Society to cease to trade and go into run-off. If the Reconstruction and Renewal plan were to fail, the Council would be required to reconsider whether Lloyd's were still a going concern. If the going concern assumption were no longer valid, the Council would be obliged to put Lloyd's into run-off. Chapter 12 considers the consequences of Lloyd's being forced into run-off. The Council has concluded that a Lloyd's run-off would lead to increased liabilities and accelerated payments for Names. Syndicates would not be able to close and Names would be unable to resign from Lloyd's until all their liabilities had been met (which, in the case of long-tail business, could take decades). Consequently, in most cases it would be unlikely that a Name's executors would be able to wind up his estate until all the Name's Lloyd's liabilities had been met.

Self-regulators-at-Lloyd's similarly encouraged members' agencies to recommend acceptance to their principals: see for example Market Bulletin Y342, August 16, 1996, "Settlement Offer Communications" from the Corporation's Communications Manager, Reconstruction and Renewal to all members' agencies. *Ibid.*, p.1-2:-

Over the next few days we shall be sending out the following letters to Names and their advisers ... [t]argeted letters to groups of Names reminding them of the benefits of the offer to them personally. These will obviously vary in content but a consistent theme will be to remind members that they cannot avoid their liabilities to policyholders and stress that, if they wish to receive the benefits of the offer, they must return their form of acceptance by noon on Wednesday, 28 August. ... In addition, a letter to almost 5,000 UK professional advisers to Lloyd's Names is going out today. This reiterates the benefits of the offer to Names and suggested that the advisers impress upon Names the urgency of their decision. ... I have no doubt that many of you have detailed strategies in place already. If we are to be assured of success, however, we shall need to pull out all the stops. ... [T]here are no longer any reasons for Names to sit on the fence. With your continuing support, the accomplishment of R&R is within our grasp.

⁸⁰ *SOD*, p.135. The phrase is misleading: the "Society" formally (and erroneously) so called (*viz.*, the Corporation) does not sell insurance. On mis-use of "Society", see p.184.

⁸¹ See for example *SOD*, pp.4-5; 16-17 ("US Names"); 127-8 ("US litigation against the Society"); App. 3 ("Part 1: Allocation of the settlement fund"), p.23 ("State Credits").

acceptance

p.5 LSO 2 was accepted by the required, previously undisclosed minimum⁸² number of offerees, each of whom then entered into RRC 1. The principal elements of R&R largely accomplished,⁸³ last-minute US litigation having failed,⁸⁴ US state securities regulators' proceedings having been formally settled,⁸⁵ and UK competition law considered,⁸⁶ and RRCs 4 and 5 having been executed the previous day, the then Chairman of Lloyd's and a government minister (who also issued a press release⁸⁷) co-knelled the Lutine Bell on September 4, 1996. R&R owed much to the

⁸² In prescribing the minimum percentage, self-regulators-at-Lloyd's took account of various factors: see for example *SOD*, p.3-4:-

In determining whether sufficient acceptances have been received for the purpose of the first condition referred to above, the Council will take account of all relevant factors, including the extent to which outstanding litigation will be brought to an end and the profile of Names from whom new money is due.

⁸³ Not all analysts were unequivocal: see for example *Lloyd's: Re-establishing the Franchise, Managing the Risks* (Moody's Investors Service, October 1997), p.5-7:-

The future of Equitas and Lloyd's are closely inter-twined, despite the technical separation of the two, and Equitas represents a material contingent risk to both the financial condition and the reputation of the Lloyd's market. ... In legal terms, the Equitas Group is independent from Lloyd's; the assumption being that there is a fire-break separating the Old Lloyd's (Equitas) from the New Lloyd's. But in practice, Moody's believes, they are not completely separate and independent — with both the New Lloyd's and the Old Lloyd's sharing not only Names and policyholders, but also the reputation of the entire market and its infrastructure. Should policyholders be paid a reduced amount of their claims in case of liquidation, we believe this would very likely affect Lloyd's reputation.

⁸⁴ *Allen v Lloyd's*, 94 F.3d 923 (4th Cir. 1996). *SOD*, July 30, 1996 cover letter from the Corporation's then CEO, p.iv: "A number of US Names have commenced legal proceedings in the US courts arguing that the reinsurance into Equitas constitutes the issue of a security which must satisfy US securities regulations. Lloyd's believes that such assertions are entirely without merit, and compliance with such regulations, even if possible, would materially delay the implementation of the reconstruction plan."

⁸⁵ See principally NASAA Agreement; State Agreement.

⁸⁶ *SOD*, p.130-1. *Ibid.*, p.130. "A filing will be made with the OFT [Office of Fair Trading] as a precautionary measure to ensure the enforceability of any provisions found to fall within the scope of the RTPA. Lloyd's considers that it is very probable that the OFT would not consider that the arrangements fall within the RTPA either in whole or in part"

⁸⁷ DTI Press Release P/96/671 4 September 1996 ("Anthony Nelson gives go ahead to Equitas"):-

Anthony Nelson, the Minister of State for Trade & Industry, today announced that the conditions on the authorisation of Equitas Reinsurance Limited and Equitas Limited ("Equitas") had been met. Lloyd's is now able to complete its reconstruction and renewal programme allowing Lloyd's Names to reinsure their 1992 and prior non-life insurance liabilities into Equitas. Announcing his decision, Mr Nelson said: "Following the high level of acceptance of Lloyd's settlement offer by Names, the Council of Lloyd's asked for my agreement that the conditions I imposed on the Equitas authorisation on 29 March of this year had been met. I have now been able to agree to that request and the reinsurance of Names 1992 and prior liabilities may now proceed.

"In reaching this decision, I have considered carefully the interests of policyholders. I have been concerned primarily to ensure that adequate provisions have been made against current and possible future claims and that the minimum solvency margin that I required has been met. Since 29 March there have been a number of developments and variations affecting the pro forma end 1995 balance sheet. However, the net effect is an overall strengthening of the position. "In March, I required a minimum solvency margin of £500 million. The position now is that Equitas is expected to have an opening solvency margin of £780 million. In addition, there are assets to back an opening unallocated claims provision of £900 million above the normal allocated provisions, together providing £1.68 billion to meet currently unanticipated claims which might arise in the future.

"I have also required Lloyd's to provide up to an additional £100 million, if so requested by Equitas in January 2002, to mitigate the effects on Equitas' reserves in the event of lower than projected interest rates or a shortfall in the contributions due from agents or brokers.

"In assessing the financial position of Equitas, I have been aided by an independent report by Coopers & Lybrand on the assets available for transfer to Equitas and advice from the Government Actuary on the liabilities to be assumed by Equitas. These have both taken into account developments since March. On the basis of the Government Actuary's advice, I remain of the view that there is a reasonable prospect that Equitas will be able to meet its liabilities in full as they fall due."

Mr Nelson also said that he expected to receive Lloyd's solvency return for the year ended 31 December 1995, as required under the Insurance Companies Act 1982, in the next few days. The return would be made in a new format which had been agreed with Lloyd's to reflect, in particular, changes to the arrangements for capital provision at Lloyd's and also modern audit standards and practices. New regulations would be introduced in Parliament shortly to put the new style returns on a statutory basis. These regulations would also contain provisions to clarify the regulatory position for those Names who now wished to leave Lloyd's but who had been unable to do so until they had reinsured their outstanding liabilities with Equitas in accordance with the arrangements which had been announced last year.

Mr Nelson said: "This is a market solution to a market problem, without use of taxpayers' money. Lloyd's and its members have been through a period of considerable uncertainty and some hardship in recent times, which has posed potential risks to Lloyd's policyholders. I regard the completion of Reconstruction and Renewal as a satisfactory outcome for policyholders. Names who wish to do so can now resign from Lloyd's, while others who wish to carry on trading will be able to do so with

advice of professional advisers such as (for example) a firm of City solicitors retained by a so-called Validation Steering Group,⁸⁸ others retained by a Settlement Agreement Review Group⁸⁹ (comprising firms of solicitors and representatives of some action groups⁹⁰), financial advisers retained by the Council (who furnished heavily caveated opinions⁹¹), and actuaries (*ditto*⁹²) — all, along with other “Additional Persons”, formally released in RRC 1 from liability to EquitasRe-reinsured SYA participants.⁹³

the prospect of a much brighter future. The fulfilment of Lloyd’s reconstruction plans will enhance the security, capacity, and competitiveness not only of the British insurance and reinsurance industry but also of wider capital markets in the UK.” Notes for Editors 1. Mr Nelson announced conditional authorisation of Equitas on 29 March 1996. 2. The opening solvency margin for Equitas will be £710m excluding provision for Lioncover, which will not be reinsured into Equitas until later in 1996.

⁸⁸ See *S&M*, and *SOD*, p.139-140.

⁸⁹ Mentioned at *S&M*, §51 (p.18).

⁹⁰ Wellington Names’ Association Newsletter No. 19, August 19, 1996, p.1.

⁹¹ See for example *SOD*, App. 4, Lazard Brothers & Co., Ltd.’s July 30, 1996 letter, p.2. *Ibid.*, p.1-2:-

[I]n forming our opinion we have assumed and relied upon the accuracy and completeness of the reports and other information provided to us and all representations made to us by the Council, Equitas or their respective advisers and auditors and we have not undertaken any independent verification of such representations, reports or other information. We do not provide legal, accounting, actuarial or tax advice. Lazard Brothers & Co., Limited will receive a fee in connection with its advice in relation to the Reconstruction and Renewal plan which is contingent on its implementation. ... The opinion of Lazard Brothers & Co., Limited is for the sole benefit of the Council and may not be used or relied upon by any other person and should not be taken to constitute a recommendation to individual Names to accept the settlement offer. Based upon and subject to the foregoing, it is our opinion, from a financial point of view, that the decision of the Council that the Reconstruction and Renewal plan is in the best interests of the Society is reasonable and has been reached after careful enquiry.

⁹² See for example *SOD*, App. 4, Tillinghast-Towers Perrin’s July 25, 1996 letter, p.1-2:-

Based on our analysis, we believe that the process used by the [Equitas Reserving] Project to determine [future operating expenses and the best estimate of insurance liabilities on an undiscounted basis to be assumed by Equitas Re] is reasonable and the methods and assumptions used are appropriate overall in relation to the stated objective of providing a best estimate on an undiscounted basis.

Ibid., p.3-4:-

We have ... been asked to review, and have only reviewed the process by which the Project made use of these analyses and the specific findings, conclusions and results therein, and we have not carried out a review of the detailed judgements and calculations contained in these analyses. ... The Provision does not include specific allowance for material extraordinary changes to the legal, social or economic environment (or to the interpretation of policy language) that might affect the costs, frequency, or future reporting of claims or for potential future claims arising from causes not substantially recognised in the historical data. ... In the case of US pollution liabilities, there is uncertainty in respect of future legislative and administrative reforms.

⁹³ See RRC 1, §§4.7, 12.7, and *ibid.*, Sch. 1, §1 definition of “Additional Persons”.

SETTLEMENT AGREEMENT [RRC 1]

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¹ Editorially added.

SETTLEMENT AGREEMENT [RRC 1]

[As published at SOD, App. 1.]

BETWEEN:

- (1) THE SOCIETY incorporated by Lloyd's Act 1871 by the name of LLOYD'S of One Lime Street, London EC3M 7HA;
| **the society:** defective: the Corporation is not a society.
| **incorporated by Lloyd's Act 1871:** viz., Lloyd's Act 1871, s.3.
- (2) EQUITAS as defined below (for itself and as agent for and on behalf of each other member of the Equitas Group);
- (3) ACCEPTING NAMES as defined below;
- (4) E&O INSURERS as defined below;
- (5) UNDERWRITING AGENTS as defined below;
- (6) AUDITORS as defined below;
- (7) BROKERS as defined below;
- (8) PSL UNDERWRITERS as defined below;
- (9) ADDITIONAL UNDERWRITING AGENCIES (NO. 9) LIMITED of One Lime Street, London EC3M 7HA;
- (10) CITIBANK, N.A. of 399 Park Avenue, New York, New York State 10043, United States of America;
- (11) ROYAL TRUST CORPORATION OF CANADA of Royal Trust Tower, P.O. Box 7500, Station A, Toronto, Ontario M5W 1T9, Canada; and
- (12) TRUSTEE as defined below.

WHEREAS:

- (A) Lloyd's published "Lloyd's: reconstruction and renewal" in May 1995 setting out proposals for the reconstruction of the Lloyd's market with the aim of resolving the problems of the past and building a strong market for the future. The purpose of this Settlement Agreement is to help achieve the objectives set out in that document and subsequent documents addressing the Reconstruction and Renewal Proposals.
| **NOTE:** see the introductory note to this Appendix.
- (B) Pursuant to the Reconstruction and Renewal Byelaw, the Reinsurance Contract will be entered into by Equitas, Lloyd's, Equitas Limited, the Substitute Agent (for itself and on behalf of the Names) and Equitas Policyholders Trustee Limited under which all Names' 1992 and Prior Business will be conditionally reinsured into Equitas.
| **conditionally:** all relevant conditions have been satisfied: see generally RRC 4, §2.
- (C) Pursuant to the Settlement Offer Document, Lloyd's has made an offer to Names to settle certain Claims in respect of their 1992 and Prior Business, which excludes life business but includes any 1992 and prior year liabilities reinsured to close into the 1993 or any later year of account.
| **NOTE:** see the introductory note to this Appendix.
- (D) A Settlement Fund of approximately £3.2 billion is to be distributed through the Combined Litigation Settlement Funds and Debt Credits in accordance with the terms set out in the Settlement Offer Document and hereof. Part of the Litigation Settlement Fund is to be paid as Expenses Refunds.
| **NOTE:** on the two settlement funds, see for example SOD, Ch. 2.

- (E) A Finality Statement has been sent to each Name setting out, inter alia, each Name's allocation from the Combined Litigation Settlement Funds (excluding Expenses Refunds) and Debt Credits.
NOTE: see generally for example R&R 5, 6, 8, 9, 11, 12, 14; *SOD*, Chs. 2, 5 and 9 etc.
- (F) Certain Names have PSL policies covering underwriting losses in relation to their 1992 and prior open years of account. Certain benefits under these policies will be collected by Equitas as agent for Names, or in some cases will be assigned to Equitas.
NOTE: most PSLI was sold to SYA participants by other SYA participants. SYAs 387, 134 and 184 were particularly notorious.
- (G) Under this Settlement Agreement, Accepting Names are waiving and releasing certain claims, including claims of fraud, breach of fiduciary duty, breach of contract and negligence, and giving certain covenants not to sue in respect of various persons, including other parties hereto.
NOTE: see RRC 1, §§4.5 and 4.7.
- (H) Certain of the other parties hereto are waiving and releasing certain claims, including claims of fraud, breach of fiduciary duty, breach of contract and negligence, and giving certain covenants not to sue in respect of Accepting Names and each other.
NOTE: see for example RRC 1, §§3.3, 3.4 and 3.5 (waivers and releases by the Corporation), §§5.1 and 5.2 (by members' and managing agencies), and §§6.1 and 6.2 (by Equitas Re).
- (I) Nothing in this Settlement Agreement shall relieve an Accepting Name from any liabilities to policyholders arising from his underwriting at Lloyd's.
NOTE: from which it follows that the Equitas Re-insured SYA participant remains a mere conduit to relevant claims securitisation funds at the Lloyd's enterprise in the ordinary way.
- (J) The parties have therefore executed, caused to be executed or agreed to execute this Settlement Agreement as a deed.

IT IS HEREBY AGREED AS FOLLOWS:

DEFINITIONS AND INTERPRETATION

1. The words and expressions used in this Settlement Agreement shall have the meanings set out in paragraph 1 of Schedule 1, and terms and provisions used in this Settlement Agreement shall be interpreted in accordance with paragraph 2 of Schedule 1.

...

OBLIGATIONS OF LLOYD'S

- 3.1 Lloyd's agrees to apply the benefits of the Combined Litigation Settlement Funds and Debt Credits, or procure that such benefits are applied in accordance with the terms of the Settlement Offer Document and hereof and that accordingly each Accepting Name will be entitled, in accordance with such terms:
 - (a) to have applied for his benefit such amounts, if any, as are set out in his Finality Statement from the Combined Litigation Settlement Funds (excluding Expenses Refunds) and/or the Debt Credits, provided he has paid, or otherwise satisfied his obligation to pay, all amounts due from him in respect of his Finality Statement; and
 - (b) to receive any part of the Expenses Refunds payable in respect of him, if any, either directly or through any Action Group of which he is a member, in accordance with the terms set out in the Settlement Offer Document and, where relevant, subject to the rules of any relevant Action Group.
- 3.2 To the extent that, where the application of the Combined Litigation Settlement Funds (excluding Expenses Refunds) and/or Debt Credits gives rise to a surplus, such surplus will be paid by Lloyd's to the Accepting Name or at his direction, or if so required by law, to the trustees of the premiums trust funds of the Accepting Name, such payment to be made on or before the later of either the day falling 56 days after the conditions in clause 2.1 have been fulfilled or the day falling 28 days after that Accepting Name's Finality Receipt has been sent to him pursuant to the terms set out in the Settlement Offer Document.
- 3.3 Subject to clause 10, Lloyd's hereby:

NOTE: this provision concerns the Corporation's Old Central Fund Byelaw claim against a SYA participant for reimbursement of a Central Fund personal-use fund float disbursement. Unreimbursed, that disbursement acquires a common-use character.

- (a) waives and releases all Central Fund Claims against each Accepting Name to the extent that such Central Fund Claims are not waived, released or otherwise extinguished under or in consequence of clause 3.1 (a); and
- (b) unconditionally and irrevocably covenants with each Accepting Name to withdraw, discontinue and/or agree to the dismissal with prejudice of all Proceedings (as is appropriate in the context of its obligations in sub-clause (a)) against any Accepting Name in respect of any Central Fund Claim, and not to make or pursue any Central Fund Claim against any Accepting Name, nor issue any Proceedings in respect of any Central Fund Claim against any Accepting Name.

The provisions of sub-clauses (a) and (b) are conditional on the relevant Accepting Name having paid, or otherwise satisfied his obligation to pay, all amounts due from him in respect of his Finality Statement in accordance with the terms set out in the Settlement Offer Document and hereof.

NOTE: Discussed at *SOD*, p.22. The Accepting Name's other relevant obligations to the Corporation are the subject of separate releases: see RRC 1, §3.4.

- 3.4 Lloyd's agrees and undertakes with each Accepting Name who has paid, or otherwise satisfied his obligation to pay, all amounts due from him in respect of his Finality Statement in accordance with the terms set out in the Settlement Offer Document and hereof, and who:

- (a) ceases at any time to be a member of Lloyd's under paragraph 40 of the Membership Byelaw (No. 17 of 1993), whether or not as modified by the Reconstruction and Renewal Byelaw; or
- (b) has ceased or ceases at any time to be a member of Lloyd's under paragraphs 20 or 21 of the Membership Byelaw (No. 9 of 1984), paragraph 41 of the Membership Byelaw (No. 17 of 1993) or by reason of death;

that such payment will constitute full discharge of that Accepting Name's liabilities to Lloyd's in respect of his 1992 and Prior Business and that Lloyd's will make no Claims against that Accepting Name in respect of his 1992 and Prior Business, in the case of an Accepting Name falling within (a) after the date he ceases to be a member and, in the case of an Accepting Name falling within (b), after the date on which Lloyd's is satisfied that all of his obligations arising out of his underwriting business at Lloyd's have been discharged or otherwise finally provided for.

liabilities to Lloyd's: viz., in relation to obligations arising under various back-office instruments to which the Corporation is a party such as the Lloyd's Deposit Trust Deed. The Accepting Name's obligations to the Corporation in respect of the Council's relevant Central Fund deployments are the subject of separate releases: see RRC 1, §3.3. Cf. for example the EquitasRe-insured SYA participant's liability to any EquitasRe-assured-at-Lloyd's.

- 3.5 Subject to clauses 9 and 10, Lloyd's hereby waives and releases all Claims against each of the Contributors, Brokers, Auditor Persons, Underwriting Agent Persons and Broker Persons howsoever arising out of or in any way related to or connected with, whether directly or indirectly, an Accepting Name's Claim or Broker Claim, except that a Claim for this purpose shall not include any Claim arising out of, or in any way related to or connected with, Lloyd's disciplinary or regulatory powers, duties, functions or procedures.

...

- 3.7 Lloyd's hereby waives any immunity it may have pursuant to section 14(3) of Lloyd's Act 1982 to any Claim by a party to this Settlement Agreement in respect of any obligations expressly assumed by Lloyd's under this Settlement Agreement.

immunity: that Lloyd's Act 1982, s.14(3) confers immunity on anyone is a myth. *Ibid.* confers a highly limited exemption on relevant defendants from having to pay damages in some circumstances.

section 14(3) of Lloyd's Act 1982: Lloyd's Act 1982, s.14(3), commonly believed to confer immunity from suit, merely confers on certain defendants an exemption from having to pay damages in certain events. Lloyd's Act 1982, s.14 ("Liability of the Society, etc."); see the full Act for definitions, etc.): "14. (1) This section shall only exempt the Society from liability in damages at the suit of a member of the Lloyd's community. (2) For the purposes of this section a member of the Lloyd's community shall be — (a) a person who is — (i) a member of the Society; (ii) a Lloyd's broker; (iii) an underwriting agent; (iv) an annual subscriber; (v) an associate; (vi) a director or partner of a Lloyd's broker or an underwriting agent; (vii) a person who works for a Lloyd's broker or underwriting agent as a manager; or (b) a person who has been a member of the Lloyd's community in one or more of the capacities listed in paragraph (a) above; or (c) a person who is seeking or who has sought to become a member of

the Lloyd's community in one or more of the capacities listed in paragraph (a) above. (3) Subject to subsections (1), (4) and (5) of this section, the Society shall not be liable for damages whether for negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 or any byelaw or regulation made thereunder — (a) in so far as the underwriting business of any member of the Society or the costs of his membership or the business of any person as a Lloyd's broker or underwriting agent may be affected; or (b) in so far as relates to the admission or non-admission to, or the continuance of, or the suspension of exclusion from, membership of the Society; or (c) in so far as relates to grant, continuance, suspension, withdrawal or refusal of permission to carry on business at Lloyd's as a Lloyd's broker or an underwriting agent or in any capacity connected therewith; or (d) in so far as relates to the exercise of, or omission to exercise, disciplinary functions, powers and duties; or (e) in so far as relates to the exercise of, or omission to exercise, any powers, functions or duties under byelaws made pursuant to paragraphs (21), (22), (23), (24) and (25) of schedule 2 to this Act; unless the act or omission complained of — (i) was done or omitted to be done in bad faith; or (ii) was that of an employee of the Society and occurred in the course of the employee carrying out routine or clerical duties, that is to say duties which do not involve the exercise of any discretion. (4) Nothing in this section shall affect the liability of the Society in respect of the death of or personal injury to any person, and for the purposes of this section the expression "personal injury" means bodily injury, any disease and any impairment of a person's physical or mental condition. (5) Nothing in this section shall exempt the Society from liability for libel or slander. (6) For the purposes of this section "the Society" means the Society itself and also any of its officers and employees and any person or persons in or to whom (whether individually or collectively) any powers or functions are vested or delegated by or pursuant to Lloyd's Acts 1871 to 1982."

OBLIGATIONS OF ACCEPTING NAMES

NOTE: See the summary at *SOD*, p.22-26.

- 4.1 Without prejudice to his obligations under the Reinsurance Contract, each Accepting Name agrees with Lloyd's to pay, or otherwise to satisfy his obligation to pay, all amounts due in respect of his Finality Statement in accordance with the terms set out in the Settlement Offer Document and hereof, free and clear of any set off, counterclaim or other deduction on any account whatsoever including, without limitation, in respect of any Claim against Lloyd's, Equitas or any other person and further agrees to the waiver of any stay of execution and to the immediate enforcement of any judgment in respect of his obligations to pay all or any such amounts due in respect of his Finality Statement.

...

- 4.5 Subject to clause 10, each Accepting Name unconditionally and irrevocably covenants with each of the Underwriting Agents (for itself and as agent and/or trustee for each of its respective Underwriting Agent Persons), the Auditors (for itself and as agent and/or trustee for each of its respective Auditor Persons), the E&O Insurers, Lloyd's (for itself and as agent and/or trustee for each Lloyd's Person) and Equitas (for itself and as agent and/or trustee for each Equitas Person) that:

- (a) he hereby waives and releases all of his Accepting Name's Claims against each of the Contributors, the Underwriting Agent Persons, the Auditor Persons, Lloyd's, the Lloyd's Persons, Equitas and the Equitas Persons; and

Accepting Name's Claims: an important qualification on "Claims" *simpliciter*. An "Accepting Name's Claim" does not include an "Equitas Claim": RRC 1, Sch. 1, §1, definition of "Accepting Name's Claim", §(e).

- (b) he will withdraw, discontinue and/or agree to the dismissal with prejudice of all Proceedings (as is appropriate in the context of his obligations in sub-clause (a)) against any of the Contributors, the Underwriting Agent Persons, the Auditor Persons, Lloyd's, the Lloyd's Persons, Equitas and the Equitas Persons in respect of any of his Accepting Name's Claims, and will not make, pursue or assert any Accepting Name's Claim against any such person, and will not issue any Proceedings in respect of any Accepting Name's Claim against any such person.

NOTE: on the very considerable quantity of litigation preempted by this subclause, see p.A2 *et seq.*

...

- 4.7 Each Accepting Name unconditionally and irrevocably covenants with each of Lloyd's (for itself and as agent and/or trustee for each Lloyd's Person and each Additional Person) and Equitas (for itself and as agent and/or trustee for each Equitas Person) that:

- (a) he hereby waives and releases all of his Other Rights against Lloyd's, Equitas, the Lloyd's Persons, the Equitas Persons and the Additional Persons; and

- (b) he will withdraw, discontinue and/or agree to the dismissal with prejudice of all Proceedings (as is appropriate in the context of his obligations in sub-clause (a)) against any of Lloyd's, Equitas, the Lloyd's Persons, the Equitas Persons and the Additional Persons in respect of any

of his Other Rights, and will not make, pursue or assert any Other Right against any such person, and will not issue any Proceedings in respect of any Other Right against any such person.

...

OBLIGATIONS OF CONTRIBUTORS AND BROKERS

| **NOTE:** see the summary at *SOD*, p.26.

- 5.1 Subject to clauses 9 and 10, each Contributor and Broker unconditionally and irrevocably covenants with each Accepting Name that:
- (a) it hereby waives and releases all of its Contributor's Claims against any of the Accepting Names; and
 - (b) it will withdraw, discontinue and/or agree to the dismissal with prejudice of all Proceedings (as is appropriate in the context of its obligations in sub-clause (a)) against any of the Accepting Names in respect of any of its Contributor's Claims, and will not make, pursue or assert any Contributor's Claim against any Accepting Name, and will not issue any Proceedings in respect of any Contributor's Claim against any Accepting Name.
- 5.2 Subject to clauses 9 and 10, each Contributor and Broker unconditionally and irrevocably covenants with each of the other Underwriting Agents (for itself and as agent and/or trustee for each of its respective Underwriting Agent Persons), the other Auditors (for itself and as agent and/or trustee for each of its respective Auditor Persons), the other E&O Insurers, the other Brokers (for itself and as agent and/or trustee for each of its respective Broker Persons), Lloyd's (for itself and as agent and/or trustee for each Lloyd's Person) and Equitas (for itself and as agent and/or trustee for each Equitas Person) that:
- (a) it hereby waives and releases all of its Contributor's Claims against each of the other Contributors, the other Brokers, the Underwriting Agent Persons, the Auditor Persons, the Broker Persons, Lloyd's, the Lloyd's Persons, Equitas and the Equitas Persons; and
 - (b) it will withdraw, discontinue and/or agree to the dismissal with prejudice of all Proceedings (as is appropriate in the context of its obligations in sub-clause (a)) against any of the other Contributors, the other Brokers, the Underwriting Agent Persons, the Auditor Persons, the Broker Persons, Lloyd's, the Lloyd's Persons, Equitas and the Equitas Persons in respect of any of its Contributor's Claims, and will not make, pursue or assert any Contributor's Claim against any such person, and will not issue any Proceedings in respect of any Contributor's Claim against any such person.

...

EQUITAS

| **NOTE:** see the summary at *SOD*, p.26-27.

- 6.1 Subject to clauses 9 and 10, Equitas unconditionally and irrevocably covenants with each of the Underwriting Agents (for itself and as agent and/or trustee for each of its respective Underwriting Agent Persons) and each of the Auditors (for itself and as agent and/or trustee for each of its respective Auditor Persons) that:
- (a) it hereby waives and releases all of its Equitas Claims against any of the Underwriting Agents, the Underwriting Agent Persons, the Auditors and the Auditor Persons, except for any Equitas Claims against the Underwriting Agents (i) in respect of any acts or omissions of the Underwriting Agent or Underwriting Agent Person in the conduct of 1992 and Prior Business since 2 May 1996, (ii) in respect of moneys lent to any such person by or on behalf of a Name (including any loan made by any trustees of any premiums trust fund of that Name) or (iii) under any of the Equitas Documents; and
 - (b) it will withdraw, discontinue and/or agree to the dismissal with prejudice of all Proceedings (as is appropriate in the context of its obligations in sub-clause (a)) against any of the Underwriting Agents, the Underwriting Agent Persons, the Auditors and the Auditor Persons in respect of any such Equitas Claim, and will not make, pursue or assert any such Equitas Claim against any such person, and will not issue any Proceedings in respect of any such Equitas Claim against any such person.

NOTE: Equitas Re and others in the “Equitas Group” (as defined) settles all “Equitas Claims” (as defined).

- 6.2 Subject to clauses 9 and 10, Equitas unconditionally and irrevocably covenants with each of the Brokers (for itself and as agent and/or trustee for each of its respective Broker Persons) that:
- (a) it waives and releases such of the Equitas Claims as are waived and released in, or pursuant to, the Brokers’ Agreement against any of the Brokers and the Broker Persons; and
 - (b) it will withdraw, discontinue and/or agree to the dismissal with prejudice of all Proceedings against any of the Brokers and the Broker Persons in respect of any Equitas Claims as are waived and released in or pursuant to the Brokers’ Agreement and will not make, pursue or assert any such Equitas Claims against any such person, and will not issue any Proceedings in respect of any such Equitas Claims against any such person.
- 6.3 Each Accepting Name acknowledges that the Substitute Agent will execute the Reinsurance Contract on his behalf and acknowledges his obligations thereunder, including the obligation to pay his Equitas Premium and that the Substitute Agent will have the authority to carry out all the usual functions, powers and duties of a managing agent including, without limitation, the power to execute such assignments, novations, declarations of trust and other instruments on behalf of the Accepting Name as may be necessary or desirable to give effect to the terms of the Reinsurance Contract and this Settlement Agreement.

novations: no EquitasRe-reinsured insurance contract has been novated away from the relevant EquitasRe-reinsured SYA participant to Equitas Re.

- 6.4 Equitas acknowledges and accepts that provided that an Accepting Name has paid, or otherwise satisfied his obligation to pay, all amounts due from him in respect of his Finality Statement, in accordance with the terms set out in the Settlement Offer Document and hereof, he shall have no further liability to Equitas in respect of his Equitas Premium. For the avoidance of doubt, nothing in this clause shall prejudice any Accepting Name’s obligation to account to Equitas for the benefit of any reinsurances, premiums, premium returns, salvages or other assets receivable from any other person (or, in each case, any security therefor or other right relating thereto), nor the rights of Equitas to receive moneys and other assets (or the benefits thereof) from the trustees of any premiums trust fund of any Accepting Name, in all cases pursuant to the Reinsurance Contract.

no further liability to Equitas in respect of his Equitas Premium: and in any event Equitas Re (*cf.* the managing agency ordinarily at Lloyd’s) has no contractual or other power to make a cash call on any Accepting Name (or any other EquitasRe-reinsured SYA participant).

Accepting Name’s obligation to account to Equitas for the benefit of any reinsurances: the EquitasRe-reinsured SYA participant has assigned the benefit of such recoveries to Equitas Re: see RRC 4, §§6.1, 6.4.

...

CROSS-CLAIMS

...

- 9.3 Where Proceedings, whether in the name of Equitas or not, are continued or commenced by, or on the instructions of, Equitas against a Broker or Broker Person in respect of an Equitas Claim which has not been waived and released pursuant to the Brokers’ Agreement, notwithstanding any other provision of this Settlement Agreement, that Broker or Broker Person shall not be prevented by reason of the terms of this Settlement Agreement from pursuing Proceedings for a contribution, indemnity or otherwise from another Participant towards any liability that Broker or Broker Person may have in such Proceedings. Such Participant (and any other Participant joined in the Proceedings) shall, on a like basis, not be prevented from pursuing Proceedings for a contribution, indemnity or otherwise against any other Participant.

...

MISCELLANEOUS

...

Disclosure

NOTE: see the summary at *SOD*, p.29.

- 12.2 Each Party hereto acknowledges and agrees that, in relation to this Settlement Agreement and the making of the Settlement Offer:

- (a) no Participant or Accepting Name owes any duty to make disclosure of any matter or any duty of care in respect of the making of any statement or representation;
- (b) no Participant or Accepting Name shall be entitled for any reason whatsoever to rescind, reform or avoid or otherwise howsoever to terminate or cancel this Settlement Agreement on the grounds of any misrepresentation, misstatement or non-disclosure;
- (c) without prejudice to sub-clause (b) above, no Participant or Accepting Name shall have any liability whatsoever for any misrepresentation, misstatement or non-disclosure; and
- (d) any Claim howsoever arising out of, or in anyway related to or connected with, any of (a) to (c) above is hereby waived and released.

This clause 12.2 shall not exclude any liability for fraudulent misrepresentation.

Parties

...

- 12.7 Each of the Parties hereby acknowledges that the Additional Persons, Auditor Persons, Broker Persons, Citibank Persons, Equitas Persons, Lloyd's Persons, Royal Trust Persons and Underwriting Agent Persons are interested and intended to take the benefit of those provisions of this Settlement Agreement in which reference is made to them and to be able to enforce such provisions and that the other Parties have a legitimate interest in ensuring that such provisions are enforced. Any Party to whom any covenant, undertaking or other promise is given in this Settlement Agreement as trustee and/or agent for any such Person hereby acknowledges and declares that it shall hold the benefit of such covenant, undertaking or other promise on trust for such Person. Further, any such Person who is not a party to this Settlement Agreement may, by notice to Lloyd's, ratify this Settlement Agreement.

...

Unknown and unsuspected claims

- 12.17 It is the intention of each of the Parties that, notwithstanding the possibility that any of the Parties subsequently obtains further information or understanding as to the facts, law or anything whatsoever which, if presently known or understood, would have affected that Party's assessment of the Claims settled, waived and released by it under this Settlement Agreement, this Settlement Agreement shall nevertheless be deemed to have fully and finally settled, waived and released any and all such Claims.
- 12.18 Each of the Parties acknowledges that the statutory provisions of certain jurisdictions (including, without prejudice, section 1542 of the California Civil Code) may limit the waiver and release of unknown or unsuspected claims and, notwithstanding such provisions and without accepting that such provisions apply to this Settlement Agreement, each of the Parties hereby waives and releases any and all rights and benefits it may have pursuant to any such provisions in relation to or in connection with any Claims which are settled, waived and released under this Settlement Agreement.

Application of Part II of the Insurance Companies Act 1982 to former members

- 12.19 Each Accepting Name who has given notice of resignation in his Form of Acceptance, hereby unconditionally and irrevocably appoints Lloyd's, acting by any Lloyd's Person, as his agent and attorney, to take all such steps (including by making any application under any section of the Insurance Companies Act 1982 to the Secretary of State for any order, dispensation or consent) and execute all such documents, in his name and on his behalf (at Lloyd's cost), as Lloyd's shall determine in its sole and absolute discretion, as the Secretary of State may reasonably require for the purpose of giving effect to the proposals made by the Secretary of State for regulation by him of former members of Lloyd's as set out in the Settlement Offer Document.

NOTE: on "regulation" of Equitas Re-insured SYA participants who are no longer Members, see now Financial Services and Markets Act 2000, ss. 320-322, and FSA Lloyd's Rulebook, Ch. 5.

Whole Agreement

- 12.20 This Settlement Agreement sets out the entire agreement and understanding of the Participants and the Accepting Names in respect of the matters referred to in this Settlement Agreement and they

acknowledge that they have not entered into this Settlement Agreement in reliance upon any representation, warranty or undertaking which is not expressly set out or referred to in this Settlement Agreement. The Settlement Agreement will be dated the date on which Lloyd's first receives a Form of Acceptance from an Accepting Name. Notwithstanding any other provision of this Settlement Agreement, the terms and conditions of the Settlement Offer set out in Appendix 2 to the Settlement Offer Document shall constitute part of the terms of this Settlement Agreement. In the event that there is any inconsistency between this Settlement Agreement and the terms and conditions of the Settlement Offer set out in Appendix 2 to the Settlement Offer Document, this Settlement Agreement shall prevail and be determinative of the rights and obligations of the Parties hereto.

LAW AND JURISDICTION

English law

- 13.1 All rights and obligations, of whatever sort, of any person, arising out of, or in any way related to or connected with, this Settlement Agreement and all terms and provisions hereof and all questions of construction, validity and performance hereunder and all appointments, authorities and powers of attorney granted pursuant hereto shall be governed by and construed in accordance with the laws of England.

Jurisdiction

- 13.2 Subject to clauses 9.2(f) and 9.4 above, in relation to any Proceedings to enforce the rights and/or obligations of any person arising out of, or in any way related to or connected with, this Settlement Agreement, and all appointments, authorities and powers of attorney granted pursuant to, arising out of, or in any way related to or in connection with, this Settlement Agreement, or such appointments, authorities or powers of attorney, each of the Parties, including for the avoidance of doubt each Accepting Name for his own part, unconditionally and irrevocably agrees that the High Court of England and Wales shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature which may arise out of or in connection with this Settlement Agreement and all appointments, authorities and powers of attorney granted pursuant hereto and that, accordingly, any suit, action or Proceedings arising out of such matters shall be brought in such Court and, to this end, each Party hereto irrevocably agrees to submit to the jurisdiction of the High Court of England and Wales and irrevocably waives any objection which it may have now or hereafter to any such suit, action or Proceedings being brought in such Court and any claim that any such suit, action or Proceedings has been brought in an inconvenient forum and further irrevocably agrees that a judgment in any suit, action or proceeding brought in the High Court of England and Wales shall be conclusive and binding upon such Party and may be enforced in the courts of any other jurisdiction.

IN WITNESS WHEREOF the parties hereto have executed this Settlement Agreement as a deed whereupon they have, from the date of such execution, and in consideration of the mutual covenants and agreements and other good and valuable consideration under or as a consequence of this Settlement Agreement, become bound in accordance with its terms.

SCHEDULE 1 — DEFINITIONS AND INTERPRETATION

1. Definitions

In this Settlement Agreement of which this Schedule 1 forms part, the following terms shall have the following meanings:

1992 and Prior Business means all liabilities under contracts of insurance (whether direct or otherwise) or reinsurance underwritten at Lloyd's (other than long term business as defined in the Insurance Companies Act 1982) and originally allocated to the 1992 year of account or any earlier year of account including, without limitation, any such liabilities reinsured to close into the 1993 or any later year of account, but excluding any liabilities re-signed, or reallocated pursuant to a premium transfer, into the 1993 or later year of account;

NOTE: For use in the RRC 1 extracts used in this Appendix, see *ibid.*, recital (B), (C), §6.1(a); Sch. 1, §1 definition of “Accepting Name’s Claim”, “Equitas Claim”, “Equitas Documents”, “Equitas Scheme”, “Finality Statement”, “Other Rights”, “Settlement Offer Document”.

...

Accepting Name means a Name who has accepted the Settlement Offer in accordance with the terms set out in the Settlement Offer Document, but not in any other capacity (including, without limitation, as an E&O Insurer or PSL Insurer);

NOTE: For use in the RRC 1 extracts used in this Appendix, see *ibid.*, parties §(3); recital (G), (H), (I), §§2.2, 4.1 heading, 4.1, 4.5, 4.5(a), (b), 4.7, 6.3, 6.4; Sch. 1, §1 definition of “Accepting Name’s Claim”, “Other Rights”, “Participant”.

Accepting Name’s Claim means a Claim by an Accepting Name (whether directly, or by or through an Action Group for his benefit, on his behalf or otherwise) howsoever arising out of, or in any way related to or connected with, whether directly or indirectly, an Accepting Name’s recruitment to underwrite insurance business at Lloyd’s through, or his membership at any time of, or the management of one or more Syndicates for the 1992 year of account or any earlier year of account (excluding for this purpose long term business, as defined in the Insurance Companies Act 1982, underwritten by such Syndicates) and/or his 1992 and Prior Business (including the management thereof except that an Accepting Name’s Claim for this purpose shall not include:

management: *viz.*, principally active underwriting and run-off management.

management of one or more Syndicates: this does not appear to cover any of Equitas Re’s RRC 4, §9 run-off agency functions. Management of the insurance affairs of SYA participants, though it includes run-off management, is a different order of activity altogether: an approved run-off company is not equivalent to a managing agency. Per *ibid.*, §9, Equitas Re does not manage any Syndicate but merely runs off the relevant liabilities of EquitasRe-reinsured SYA participants, like an approved run-off company conventionally at Lloyd’s. It follows that — if §(f) below were absent — an EquitasRe-reinsured SYA participant does not waive or release any claim against Equitas Re in respect of its actionable misconduct under RRC 4, §§9-10.

for this purpose: no purpose is mentioned.

- (a) a Claim in respect of the benefit of any insurance or reinsurance contract which an Accepting Name may have entered into in his personal capacity to protect himself or his estate from loss from any cause (including without limitation, under any PSL or EPP Contract);
- (b) a Claim against an Auditor in respect of any advice, whether financial or otherwise, given or which should have been given to an Accepting Name in his personal capacity and not as a member of one or more Syndicates, except that this exclusion shall not extend to Claims for the recovery of any underwriting losses for 1992 and Prior Business in respect of advice or information given, or which should have been given, to the extent that that advice or information or the absence thereof influenced an Accepting Name’s decision to become a member of Lloyd’s, or choice of Syndicates, or level of participation on particular Syndicates or his decision to continue on particular Syndicates or as a member of Lloyd’s;
- (c) an application made on or before 4 April 1996 for compensation under the Members’ Compensation Scheme Byelaw (No. 15 of 1989), except that this exclusion shall not extend to any such application which relates to any Syndicate year of account in respect of which an Accepting Name is receiving the benefit of an allocation from the Combined Litigation Settlement Funds;
- (d) a Claim against an Underwriting Agent in respect of any failure by that Underwriting Agent to give instructions, make demand or take any other steps which it is or was within the power of that Underwriting Agent to take, which are necessary to facilitate the payment of an Accepting Name’s Equitas Premium or any other liability covered by his Finality Statement;
- (e) an Equitas Claim; and
- (f) a Claim under the Reinsurance Contract or under any of the Equitas Documents against any party thereto;

NOTE: For use in the RRC 1 extracts used in this Appendix, see *ibid.*, §4.5(a), (b). A RRC 1 Accepting Name is free to sue Equitas Re for actionable misconduct under RRC 4, §9.

...

Additional Persons means, to the extent they were acting in such capacity:

- (a) the members of the Reserve Groups and the past and present advisers, lawyers, consultants (including self-employed contractors) and secondees to the Reserve Groups, including each of their past and present directors, officers, partners, associates and employees;
- (b) the members of the Names Committee;
- (c) the members of the Settlement Allocation Advisory Committee;
- (d) the members of the Validation Steering Group and the past and present partners and employees of Slaughter and May in their capacity as advisers to the Validation Steering Group;
- (e) the members of the Settlement Agreement Review Group and the past and present partners and employees of Wilde Sapte in their capacity as advisers to the Settlement Agreement Review Group; and
- (f) the Neutral Evaluator;

NOTE: For use in the RRC 1 extracts used in this Appendix, see *ibid.*, §§4.7(a), (b), 12.7.

associate means any person for whose acts or omissions another person is vicariously responsible;

NOTE: For use in the RRC 1 extracts used in this Appendix, see *ibid.*, Sch. 1, §1 definition of “Additional Persons”, “Auditor Persons”, “Broker Persons”, “Underwriting Agent Persons”.

Auditor means the present partners of those audit firms which execute the Auditors’ Contribution Agreement, but only in that capacity;

NOTE: For use in the RRC 1 extracts used in this Appendix, see *ibid.*, parties §(6); §§4.5, 5.2, 6.1, 6.1(a), (b); Sch. 1, §1’s definition of “Accepting Name’s Claim”, “Auditor Persons”, “Auditors’ Contribution Agreement”, “Auditor Settlement Fund”.

Auditor Persons means those persons or firms referred to in parts II and III of Schedule 1 to the Auditors’ Contribution Agreement, including the past and present partners, directors, officers, associates and employees of each of the Auditors and their predecessor firms, but only in that capacity;

NOTE: For use in the RRC 1 extracts used in this Appendix, see *ibid.*, §§4.5, 4.5(a), (b), 5.2, 5.2(a), (b), 6.1, 6.1(a), (b), 12.7.

Auditors’ Contribution Agreement means the agreement entered into, or to be entered into, between the Auditors and Lloyd’s in connection with the Settlement Offer;

NOTE: For use in the RRC 1 extracts used in this Appendix, see *ibid.*, Sch. 1, §1 definition of “Auditor”, “Auditor Persons”.

Auditor Settlement Fund means the fund of approximately £156 million offered to Names in accordance with the terms of the Settlement Offer Document;

NOTE: For use in the RRC 1 extracts used in this Appendix, see *ibid.*, Sch. 1, §1 definition of “Combined Litigation Settlement Funds”.

...

Broker means the companies and partnerships who execute deeds of adherence to the Brokers’ Agreement, but only in that capacity;

NOTE: For use in the RRC 1 extracts used in this Appendix, see *ibid.*, parties §(7), §§5.2 heading, 5.2, 5.2(a), (b), 6.2, 6.2(a), (b), 9.3; Sch. 1, §1 definition of “Broker Persons”, “Brokers’ Agreement”, “Brokers’ Contribution Agreement”.

...

Broker Persons means any subsidiary or holding company (whether direct or indirect) of a Broker, or any other subsidiary of any such holding company, from time to time, including any former holding company or subsidiary, and the past and present partners, directors, officers, associates and employees of a Broker or of any such companies or partnerships, but only in that capacity;

Brokers’ Agreement means the agreement entered into, or to be entered into, between certain brokers, Lloyd’s and Equitas in connection with the Reconstruction and Renewal Proposals;

Brokers’ Contribution Arrangements means the fee to be paid by brokers pursuant to the brokers contribution requirements made under the Reconstruction and Renewal (Amendment) Byelaw (No. 26 of 1996);

Central Fund has the meaning given in the Central Fund Byelaw (No. 4 of 1986);

...

Citibank Claim means a Claim, other than a Citibank R&R Payment Claim, by an Accepting Name (whether directly, or by or through an Action Group for his benefit, on his behalf or otherwise) against

Citibank, but only in respect of any act or failure to act of Citibank in its capacity as trustee of the Citibank Trust Funds, howsoever arising out of, or in any way related to or connected with, whether directly or indirectly, an Accepting Name's membership at any time of, or the management of, one or more Syndicates for the 1992 year of account or any earlier year of account (excluding for this purpose long term business, as defined in the Insurance Companies Act 1982, underwritten by such Syndicates) and/or his 1992 and Prior Business (including the management thereof), provided such Claim relates to an act or failure to act of Citibank prior to the payment by Citibank of that part of such Name's Equitas Premium to be paid out of the Lloyd's American Trust Funds in accordance with instructions or directions given by, or on behalf of, the Substitute Agent;

...

Claim means a claim, potential claim, counterclaim, claim by way of enforcement of judgment, award or order of any kind (including as to interest and costs), right of appeal, claim by way of contribution, right of set off, indemnity, cause of action, right or interest of any kind or nature whatsoever, whether known or unknown, suspected or unsuspected, whether arising in contract tort, equity, fraud, as a consequence of wilful, reckless or negligent conduct, or of any fiduciary, statutory, regulatory or other duty, or otherwise, howsoever and whenever arising, and in whatever capacity and jurisdiction;

Combined Litigation Settlement Funds means the sum of the Litigation Settlement Fund and the Auditor Settlement Fund;

...

Contributors means collectively the Auditors, E&O Insurers and Underwriting Agents;

Contributor's Claim means a Claim by a Contributor or Broker (including a Claim by way of subrogation) howsoever arising out of, or in any way related to or connected with, whether directly or indirectly, an Accepting Name's recruitment to underwrite insurance business at Lloyd's through, or his membership at any time of, or the management of one or more Syndicates for the 1992 year of account or any earlier year of account (excluding for this purpose long term business, as defined in the Insurance Companies Act 1982, underwritten by such Syndicates) and/or his 1992 and Prior Business (including the management thereof), including, without limitation, a Claim under an agency agreement in respect of an Accepting Name's underwriting business on any such Syndicate, except that a Contributor's Claim for this purpose shall not include:

- (a) a Claim by an Underwriting Agent under an agency agreement against an Accepting Name to the extent (and for so long as) the undertakings from Lloyd's set out in clause 3.4 do not apply to that Name;

NOTE: non-standard agency agreements, SMA 1, SMA 2 and SUA 1 all empower the members' / managing agency to collect against the SYA participant: see for example *Marchant & Eliot Underwriting Ltd. v Higgins* [1996] 2 Lloyd's Rep. 31 (CA) on appeal from [1996] 1 Lloyd's Rep. 313 (Rix J); *Boobyer v David Holman & Co. Ltd. and Lloyd's (No. 2)* [1992] 1 Lloyd's Rep. 96 (Saville J).

- (b) a Claim in respect of the benefit of any insurance or reinsurance contract under which a Contributor or Broker is insured or reinsured by another Participant or Accepting Name, except that this exclusion shall not extend to a Claim by way of subrogation or similar right as a consequence of the payment or settlement of any insurance liability in respect of an Accepting Name's Claim which is disposed of, or otherwise compromised or dealt with under this Settlement Agreement or otherwise; and
- (c) a Claim under the Reinsurance Contract or under any of the Equitas Documents against a party thereto;

Council means the Council of Lloyd's, including its members and any persons by whom it acts;

Debt Credits means, in respect of each Name, any amount offered to that Name as so described and set out in his Finality Statement including any State Credits, to be applied in the reduction of the amount to be paid by that Name pursuant to his Name's Finality Statement (which may include the waiver of certain amounts owing to Lloyd's arising out of the application of assets of the Central Fund on his behalf);

...

E&O Insurers means the Syndicates and companies which execute deeds of adherence to the E&O Insurers Contribution Agreements or on whose behalf such deeds of adherence are executed, but only in their capacity as insurers of relevant E&O policies;

...

Equitas means Equitas Reinsurance Limited, a limited company registered in England and Wales with company number 3136300 whose registered office is at 20-22 Bedford Row, London WC1R 4JS;

20-22 Bedford Row, London WC1R 4JS: obsolete: Equitas Re's registered office is presently 33 St. Mary Axe, London EC3A 8LL: see for example Equitas Re 363s December 11, 2001 annual return as at December 5, 2001, p.1.

Equitas Claim means a Claim howsoever arising out of, or in any way related to or connected with, whether directly or indirectly, 1992 and Prior Business, the benefit of which is assigned or transferred to Equitas, or in respect of which Equitas is otherwise entitled pursuant to the Reinsurance Contract, including, without limitation, Claims in respect of Syndicate reinsurances, premiums, premium returns, salvages or other assets receivable from any other person (or, in each case, any security therefor or other right relating thereto);

the benefit of which: viz., the benefit of an insurance-related claim. An Equitas Claim thus relates to insurance, not to Equitas Re's RRC 4, §9 run-off agency functions (as to which see RRC 1, Sch. 1, §1 definition of "Accepting Name's Claim").

is assigned: viz., presumably, is, is to be, or has been.

is assigned ... to Equitas: see for example RRC 4, §§6.1, 6.4, 6.5.

Equitas Documents means any agreement entered into or to be entered into between, inter alia, Equitas and any agents in relation to 1992 and Prior Business, including the supervisory management agreements, the information and administration agreements and the run-off administration agreements;

any agents: see the following commentary.

the supervisory management agreements: viz., forms of RRC 2, which were made, at various dates in December 1995, between (1) Equitas Re; (2) the particular managing agency; (3) the Corporation.

the information and administration agreements: viz., forms of RRC 8, which were made on May 2, 1996 between: (1) Equitas Re; (2) the "Managing Agent" as defined; (3) the Corporation.

the run-off administration agreements: viz., forms of RRC 6. Forms of RRC 6 were made, at various times in August 1996, between (1) Equitas Ltd.; (2) the particular "Contractor".

Equitas Group means Equitas and any subsidiary or holding company of Equitas and any subsidiary of any such holding company;

...

Equitas Scheme means the scheme for the reinsurance to close by Equitas of 1992 and Prior Business as referred to in the Reconstruction and Renewal Byelaw;

...

Finality Statement means the statement of a Name's Lloyd's affairs in respect of his 1992 and Prior Business sent to him with the Settlement Offer Document or otherwise, together with the supporting data to be sent in August 1996;

...

Litigation Settlement Fund means the fund of approximately £980 million offered to Names in accordance with the terms of the Settlement Offer Document;

Lloyd's means the Society incorporated by Lloyd's Act 1871 by the name of Lloyd's;

...

Name means a member of a Syndicate and, where the context so requires, includes any administrator, committee, curator bonis, executor, liquidator, manager, personal representative, receiver (including any receiver appointed under the Mental Health Act 1983), supervisor, trustee in bankruptcy and any other person entitled or bound to administer the affairs of a member of a Syndicate for him and any person performing similar functions in any jurisdiction for him;

...

Neutral Evaluator means the Neutral Evaluator provided for in the State Agreement;

...

Notices of Requirements means the notices of requirements issued to Equitas and Equitas Limited by the Secretary of State on 29 March 1996 as replaced by revised notices of requirement which expire on 29 March 2006;

NOTE: Notices of Requirements apparently were replaced on December 1, 2001 by so-called "scope of permission notices", which apparently (FSA source) are not publicly available.

Other Right means a Claim by an Accepting Name (whether directly, or by or through an Action Group for his benefit, on his behalf or otherwise) arising out of, or in any way related to or connected with, whether directly or indirectly, the Reconstruction and Renewal Proposals including, but not limited to:

- (a) the making of the Reconstruction and Renewal Byelaw, any resolutions passed or action taken pursuant thereto and any other regulatory and related actions in relation to the implementation of the Reconstruction and Renewal Proposals;
- (b) the reserving exercise in relation to 1992 and Prior Business, including the work of the Reserve Groups and their advisers and the determination of the Equitas Premium in the context of the Equitas Scheme;
- (c) the allocation of the Combined Litigation Settlement Funds or Debt Credits, including the work of the Names Committee and the Settlement Allocation Advisory Committee;
- (d) the work of the Validation Steering Group and the Settlement Agreement Review Group;
- (e) the preparation and publication of the Settlement Information Document, the Settlement Offer Document, the Finality Statements and the Settlement Agreement; and
- (f) the State Agreement, including the allocation and reallocation of the State Credits and the work of the Neutral Evaluator;

except that a Claim for this purpose shall not include:

- (g) a Claim against any person in respect of any obligations expressly assumed by him under this Settlement Agreement; and
- (h) a Claim under the Reinsurance Contract or any of the Equitas Documents;

NOTE: see similarly RRC 1, Sch. 1, §1 definition of "Accepting Name's Claim", §(f).

...

Participant means any of the Parties (other than an Accepting Name) and any Additional Person, Auditor Person, Broker Person, Citibank Person, Equitas Person, Lloyd's Person, Royal Trust Person, Substitute Agent Person and Underwriting Agent Person;

Party means a party to this Settlement Agreement who is listed or referred to at the head of this Settlement Agreement;

...

Proceedings means any legal, arbitral, administrative, regulatory or other action or proceeding (including to enforce, or any appeal from, any judgment, award or order) of any nature whatsoever;

...

PSL Underwriters means the Syndicates and companies which execute PSL Administration Agreements or on whose behalf such Agreements are executed, but only in their capacity as insurers of PSL Contracts;

Reconstruction and Renewal Byelaw means the Reconstruction and Renewal Byelaw (No. 22 of 1995);

Reconstruction and Renewal Proposals means the proposals originally described in the document entitled "Lloyd's: reconstruction and renewal" issued by the Council in May 1995, as from time to time varied or supplemented by, inter alia, the Settlement Information Document and the Settlement Offer Document, and the implementation of the proposals inter alia, through the Settlement Offer and the Equitas Scheme;

...

Settlement Agreement means this agreement, as may be amended from time to time;

...

Settlement Fund means the sum of the Combined Litigation Settlement Funds and Debt Credits;

...

Settlement Information Document means the document entitled "Reconstruction & Renewal: Settlement Information" dated 20 June 1996 which was sent to Names;

Settlement Offer means the offer, the terms of which are contained in the Settlement Offer Document, and any revision or amendment thereof;

Settlement Offer Document means the document to which this Settlement Agreement is appended by which Lloyd's made an offer to Names, inter alia, to settle the litigation in the Lloyd's market arising out of 1992 and Prior Business and any subsequent document by which the Settlement Offer is revised or amended;

State Agreement means the agreement dated 11 July 1996 between Lloyd's and the securities regulators in certain states in the United States of America;

State Credits means, in respect of each Name, any amount offered to that Name pursuant to the State Agreement to be applied in the reduction of the amount to be paid by that Name pursuant to his Finality Statement;

...

Substitute Agent means Additional Underwriting Agencies (No. 9) Limited, a limited company in England and Wales with company number 2666937 whose registered office is at One Lime Street, London EC3M 7HA, which the Council proposes to appoint to act as substitute managing agent of the syndicates to be reinsured by Equitas;

...

Syndicate means a group of underwriting members of Lloyd's for whose account an active underwriter accepted or accepts insurance and/or reinsurance business at Lloyd's;

NOTE: the definition is multiply defective: see RRC 4, Sch. 2, §1 definition of "Syndicate".

...

Underwriting Agent means the companies and partnerships who execute deeds of adherence to the Underwriting Agents' Contribution Agreement but only in that capacity;

NOTE: "underwriting agent" is meaningless at Lloyd's.

Underwriting Agent Persons means any subsidiary or holding company (whether direct or indirect) of an Underwriting Agent, or any other subsidiary of any such holding company, from time to time, and the past and present directors, officers, partners, associates and employees of each of the Underwriting Agents or of any such companies (but only in that capacity), but shall not include Stephen Roy Merrett, any company excluded under the terms of the Underwriting Agents' Contribution Agreement or any company in respect of which, at the date on which the Settlement Offer is made:

Merrett: see for example *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265 (Cresswell J).

- (a) an order has been made, a petition has been presented or a meeting has been convened for the purpose of considering a resolution for the winding up of the company or for the appointment of any provisional liquidator;
- (b) an administration order has been made or a petition has been presented for an administration order to be made in relation to the company;
- (c) a receiver or manager (including, without limitation, an administrative receiver) has been appointed or possession has otherwise been taken by or on behalf of the holders of any debentures secured by a floating charge, of all or any part of the company's property, assets or undertaking; or
- (d) a voluntary arrangement, proposed pursuant to Part I of the Insolvency Act 1986, has been approved or the company has entered into a compromise or other arrangement with all or some part of its creditors;

Underwriting Agents' Contribution Agreement means the agreement entered into, or to be entered into, between Underwriting Agents, Lloyd's and Equitas in connection with the Settlement Offer[.]

...

2. Interpretation

In this Settlement Agreement, save where the context requires otherwise:

- (a) the expressions *subsidiary* and *holding company* shall have the meanings ascribed thereto in sections 736 and 736A of the Companies Act 1985;
- (b) references to any clause, sub-clause or schedule without further designation shall be construed as a reference to the clause, sub-clause or schedule to or of this Settlement Agreement so numbered and this Schedule 1 forms part of and is deemed to be incorporated in this Settlement Agreement;
- (c) clause and schedule headings are for convenience only and shall not be taken into account in the interpretation of this Settlement Agreement;
- (d) reference to any Act, statute, statutory provision or byelaw (including any Lloyd's byelaw) shall include a reference to that provision as amended, re-enacted or replaced from time to time whether before or after the date on which the Settlement Offer is made and any former provision replaced (with or without modification) by the provision referred to; and
- (e) reference to any gender shall include all genders and references to the singular shall include the plural and vice versa.

...

Appendix 1.2

Reinsurance and Run-off Agreement (RRC 4)

INTRODUCTORY NOTE

A1.2-1 RRC 4¹ has four principal purposes:² (1) to effect, at *ibid.*, §3, R&R's EquitasRe-reinsurance³ component, *viz.*, Equitas Re's sale and every EquitasRe-reinsured SYA participant's compulsory purchase (regardless of whether he entered into RRC 1) of unlimited outward reinsurance (which also has some effects of conventional RTC⁴). Each purchaser⁵ of the RRC 4, §3 product is in RRC 4 called a "Name"⁶ (in this Edition, "EquitasRe-reinsured SYA participant"). Equitas Re expressly waives its right to avoid any of its RRC 4 engagements for innocent or fraudulent and or misrepresentation,⁷ and its right to terminate for failure of consideration;⁸ (2) to compulsorily appoint, at *ibid.*, §9,⁹ Equitas Re as each EquitasRe-reinsured SYA participant's agent to run off all his EquitasRe-reinsured liabilities; (3) to empower¹⁰ Equitas Re to retrocede¹¹ all its RRC 4, §3 liabilities to Equitas Ltd. (which it does in RRC 5); (4) to empower¹² Equitas Re to delegate its RRC 4, §9 run-off agency functions to Equitas Ltd. (*ditto*). RRC 4 is of marginal relevance to the EquitasRe-assured-at-Lloyd's, who appears to retain his recourse rights against relevant common-use claims securitisation funds and the Lloyd's enterprise in the ordinary way.¹³ RRC 4 is known to have been amended once: see Reinsurance and Run-Off Contract Amendment Agreement, December 17, 1997. A copy was not timeously available to the Publisher.

¹ See for example *Mander v Equitas Ltd.* [2000] Lloyd's Rep IR 520 (Morison J); *Price and Price v Lloyd's* [2000] Lloyd's Rep IR 453 (Colman J); *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA); *Lloyd's v Leighs* {1a} [1997] CLC 759 (Colman J); *ibid.* {2a} [1997] CLC 1012 (Colman J); *ibid.* {1b & 2b} [1997] CLC 1398, 1400-1401 (CA). For a summary, see for example Equitas Holdings RA fye 1996, p.43-5 (reinsurance and run-off contract); *SOD*, p.98 etc. and *ibid.*, App. 5.

² See the summary at *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156, 161 (Hobhouse LJ):-

This contract provided a method whereby a single legal entity of assured ability and willingness to discharge the insurance liabilities of Names to those who had placed insurances in the Lloyd's market from outside (as well as from inside the market) could do so in an orderly and assured fashion. ... The contract, or related contracts had also to make provision for the orderly application of the assets of the individual Names within the market, including their assets held by or formerly held by their [managing] agents, their existing reinsurance contracts, their various trust funds and deposits and the litigation funds which had resulted from the successful litigation of groups of Names against those who had culpably not discharged their duty of safeguarding the interests of Names.

The court did not consider recourse to the Lloyd's enterprise.

³ See p.A38.

⁴ See p.207.

⁵ Also party to RRC 4 is every SYA participant — a "Closed Year Name" — directly or indirectly conventionally-outwardly-RTCd by any "Name": see generally RRC 4, §3.3. EquitasRe-reinsurance in the context of R&R's EquitasRe-reinsurance component is not the only RTC product intended to be sold by Equitas Re. Equitas Re has committed to quote for RTC of participants on heirless 1993, 1994, 1995 and 1996 SYAs: see for example Equitas Holdings RA fye March 31, 1998, p.4 (Chairman's statement): "The vast majority of the 1993 Orphan Syndicates has received and accepted quotes from the ongoing market, which eliminates the need for an Equitas quote, but we have issued indicative quotes for two Orphan Syndicates which are still under consideration."

⁶ See for example RRC 4, Sch. 2, §1 definition of "Name" *simpliciter* (*cf. ibid.*, "Closed Year Name").

⁷ RRC 4, §3.9.

⁸ RRC 4, §3.10.

⁹ See principally RRC 4, §§9-10. On Equitas Re's RRC 4, §9 run-off agency functions, see Chapter 2.

¹⁰ At RRC 4, §9.3.

¹¹ See generally RRC 5.

¹² At RRC 4, §9.3.

¹³ See generally Chapter 3.

REINSURANCE AND RUN-OFF AGREEMENT

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REINSURANCE AND RUN-OFF AGREEMENT [RRC 4]

[Unless otherwise stated this is version FW962500.261/2+]

THIS AGREEMENT is made on 3 September 1996

BETWEEN:

EQUITAS REINSURANCE LIMITED a limited company registered in England and Wales with company number 3136300 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (*ERL*);

NOTE: for RRC 4 use of “ERL”, see *ibid.*, *passim*. For RRC 4 use of “Equitas” *simpliciter*, see for example *ibid.*, recital (G), (I), §§2.1(b)(i), (ii), (iii), (iv), (e), 3.6, 3.11(c), 4.7, 7.3, 9.3, 15.4, 24; Sch. 3, §§2.1(c), 5.2, 8.1, 8.1(b), 13.1, 13.2, 14; Sch. 4, §2 definition of “Available Surplus”, §§3.2, 5.

20-22 Bedford Row, London WC1R 4JS: obsolete: Equitas Re’s registered office is presently 33 St. Mary Axe, London EC3A 8LL.¹

ADDITIONAL UNDERWRITING AGENCIES (No. 9) LIMITED a limited company registered in England and Wales with company number 2666937 whose registered office is at Lloyd’s of London, One Lime Street, London EC3M 7HA (the *Substitute Agent*);

NOTE: AUA 9’s RRC 4 relevant functions should be read with RRC 1, §6.3. See also RRC 4, recitals (C)-(D). For RRC 4 use of “Substitute Agent”, see *ibid.*, *passim*. And see *ibid.*, recital (C). AUA 9 is not independent of self-regulators-at-Lloyd’s.² In RRC 14, the corresponding parties section adds “Council Secretariat” before “Lloyd’s of London”. The definition fixes AUA 9 with the role of “Substitute Agent”: *cf.* the approach adopted at RRC 7, parties definition of “Trustee”. AUA 9 (as the Council’s instrument) had an extensive role in R&R.³ For example, substituted by the Council for each managing agency,⁴ it executed forms of RRC 4 on behalf of every⁵ RRC 4 Name and (as extraordinary rather than substitute agent) Closed Year Name; it gave instructions for payment of EquitasRe-reinsurance premium from EquitasRe-reinsured SYA participants’ LATFs.⁶ Since rescission of the General Undertaking was impossible, and there was apparently nothing objectionable about either Byelaw 20 of 1983 or relevant Council procedure, AUA 9 was necessarily properly authorised.⁷

Agencies: infelicitous: AUA 9 is only one agency entity.

Lloyd’s of London: error: “Lloyd’s of London” is a trademark, not an entity or place.

THE UNDERWRITING MEMBERS OF LLOYD’S comprising the syndicates specified in schedule 1 as constituted for the years of account specified in schedule 1 (the *Syndicates* and each a *Syndicate*) in their capacity as members of one or more of the Syndicates (the *Names*) acting through the Substitute Agent;

NOTE: For RRC 4 use of the defined phrases, see each phrase’s entry at *ibid.*, Sch. 2, §1. RRC 4 references to Members include to former Members: *ibid.*, Sch. 2, §2(f)(i). The Council was self-regulatorily entitled to contractually compel each EquitasRe-reinsured SYA participant to enter into RRC 4 because of the latter’s execution of the compulsory General Undertaking⁸ (the perpetual⁹ governing law¹⁰ and adjudicating forum¹¹ clauses of which were the subject of much pre-R&R US federal litigation).

¹ Equitas Re 363s December 11, 2001 annual return as at December 5, 2001, p.1.

² See for example *SOD*, App 7, p12 (“It is proposed that the Substitute Agent will be a wholly-owned subsidiary of the Society and under the direct control of the Council. It is ... intended that the Society itself be one of the directors of the Substitute Agent and that it would act through the Council in taking actions and decisions in its capacity as a director.”)

³ On AUA 9’s authority, see for example *Lloyd’s v Leighs* {1b & 2b} [1997] CLC 1398, 1405 (CA); *ibid.*, {1a} [1997] CLC 759, 774 (Colman J).

⁴ See for example RRC 4, recital (C).

⁵ See for example RRC 4, recital (C) (“The Substitute Agent [AUA 9] was appointed to act as substitute managing agent for the Names and the Closed Year Names on the terms set out in the Substitute Agent’s Appointment”, etc.

⁶ See for example RRC 1, Sch. 1, definition of “Citibank Claim”.

⁷ *Lloyd’s v Leighs* {1b & 2b} [1997] CLC 1398, 1405 (CA).

⁸ See for example *Lloyd’s v Leighs* {1a} [1997] CLC 759 (Colman J); *ibid.* {2a} [1997] CLC 1012 (Colman J); *ibid.* {1b & 2b} [1997] CLC 1398 (CA); *Lloyd’s v Clementson* {2} [1997] LRLR 175, 178 (Cresswell J); *Lloyd’s v Clementson* {1a} [1995] LRLR 307, 311 (Saville J); *ibid.*, {1b} 322 (Bingham MR); 330, 331 (Steyn LJ)., *R v Lloyd’s ex parte Briggs* [1993] 1 Lloyd’s Rep 176 (QB Div. Ct.); *Ashmore v Lloyd’s* (No. 2) [1992] 2 Lloyd’s Law Rep. 620 (Gatehouse J). See historically *Lloyd’s v Harper* (1880) 16 Ch.D. 290,303 (Fry J, not affected on appeal; “[E]ach person who became a member of Lloyd’s contracted to observe all the by-laws and regulations for the time being in force in respect of that society, and further contracted to indemnify the managing committee of the society against any loss they might incur in that capacity”). On the Council’s power to promulgate the General Undertaking, see Lloyd’s Act 1982, Sch. 2, §(1).

⁹ General Undertaking, §2.3.

tion¹²), the sole mechanism enabling the Council's contract-based self-regulatory jurisdiction over the Member and the sole purpose of which is to commit the Member to the (then principally contractual) self-regulatory system at Lloyd's¹³ in whatever form it happens to take throughout the period of Membership.¹⁴

underwriting: the qualification is superfluous and inaccurate (the draftsman may have equated (the now repealed) Insurance Companies Act 1982, s.83(2)) "underwriter" with "underwriting member"); by the time of RRC 4's execution, not every relevant originally underwriting Member will necessarily still be self-regulatorily so classified;¹⁵ *cf.* the two other available self-regulatory formal classifications, *viz.*, "non-underwriting"¹⁶ and "not underwriting".

members of Lloyd's: *viz.*, each relevant SYA participant. The refusenik SYA participant's failure to participate in RRC 1¹⁷ is irrelevant to his compulsory participation as an EquitasRe-reinsured SYA participant in RRC 4, including his obligation¹⁸ to pay the RRC 4-mandated¹⁹ EquitasRe-reinsurance premium. All SYA participants (that is, the participants and — if merely dead after the SYA's first YOR — generally their personal representatives²⁰) will usually be Members: it is rare for the Council to permit a Member's resignation to take effect before he has been conventionally outwardly-RTCed in relation to each SYA on which he participates.

comprising: infelicitous: a syndicate is comprised (to the extent it is comprised of anything) of YAs. It is incapable of having members or participants: see the annotation to "syndicate" and "Syndicate" at RRC 4, Sch. 2, §1.

the syndicates specified in schedule 1 as constituted for the years of account: infelicitous to the point of being nonsensical: see the annotation to "syndicate" and "Syndicate" at RRC 4, Sch. 2, §1. The draftsman appears to be confusing YAs (which he uses correctly in the (infelicitous) RRC 4, Sch. 2, §1 definition of "Syndicate") with UYs.

Syndicate: defined repetitiously in RRC 4, Sch. 2, §1.

members of ... the Syndicates: infelicitous: (1) a syndicate is incapable of having members or participants. Members' and managing agencies appear to have used the compound myth of "syndicate membership" to encourage Members to participate on contiguous YAs of a particular syndicate, a practice — which fosters the illusion, for SYA participants and observers, of syndicate membership — generally beneficial to the managing agency but not necessarily to the participant, especially to the extent that he is doing so to chase his "losses";²¹ (2) SYA participation is not in the nature of membership. For example, the SYA participant is not self-regulatorily permitted to resign from a SYA: "resign" in the context of SYA participation is commonly used at Lloyd's, erroneously, to describe a Member deciding not to participate on some future (usually the contiguous) YA of a particular syndicate. Once participating on a SYA, the participant cannot resign from it. He compounds, rather than reduces, his exposure by deploying PIL on other SYAs.

as members of one or more of the Syndicates: a Member would typically participate on more than one UY-contemporaneous SYA.

Names: defined repetitiously at RRC 4, Sch. 2, §1.

acting through the Substitute Agent: see parties section, annotation to "Additional Underwriting Agencies (No. 9) Limited".

THE UNDERWRITING MEMBERS OF LLOYD'S comprising syndicates reinsured to close whether directly or indirectly into the Syndicates or Centrewrite (the *Closed Year Syndicates* and each a *Closed Year Syndicate*) in their capacity as members of one or more of the Closed Year Syndicates (the *Closed Year Names*) acting through the Substitute Agent;

10 General Undertaking, §2.1.

11 General Undertaking, §2.2.

12 See for example *Richards v. Lloyd's*, 107 F.3d 1422 (9th Cir. 1997); *Haynsworth v Lloyd's*, *Leslie v Lloyd's*, 121 F.3d 956 (5th Cir. 1997); *Allen v Lloyd's*, 94 F.3d 923 (4th Cir. 1996); *Shell v R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995), *aff'g* 850 F.Supp. 620 (S D Ohio); *Bonny v Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied* 114 S.Ct. 1057 (1994); *Roby v Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), *cert. denied* 114 S.Ct. 385 (1993); *Riley v Kingsley Underwriting Agencies, Ltd.* 969 F.2d 953 (10th Cir. 1992), *cert. denied* 113 S. Ct. 658 (1992), etc.

13 *Lloyd's v Clementson* {1a}

14 General Undertaking, §1.

15 See generally Lloyd's Act 1982, Sch. 1.

16 Of considerable vintage: see for example Lloyd's Act 1871, Schedule, §2.

17 See Appendix 1.1.

18 See for example *Price and Price v Lloyd's* [2000] Lloyd's Rep IR 453 (Colman J); *Lloyd's v Leighs* {1a} [1997] CLC 759 (Colman J); *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398 (CA), etc.

19 On RRC 4, §3 consideration, see *ibid.*, §5 and *ibid.*, Sch. 4.

20 See for example SMA 1, §12(h), *ibid.*, §17(a)(i); SSA 1, §17(c); SMA 2, §8.6; SUA 1, §6.3, §8.2(a)(i) and *ibid.*, §14.2(a). Death is not mentioned in SIA 1. See incidentally *Wyniatt-Husey v R.J. Bromley (Underwriting Agencies) PLC* [1996] LRLR 310 (Langley J).

21 Chasing losses by deploying PIL on contiguous YAs of a particular syndicate has acquired judicial respectability: *Deeny v Gooda Walker Ltd.* {3} [1996] LRLR 183, 197 (Phillips J); see *Wyniatt-Husey v R.J. Bromley (Underwriting Agencies) Plc* [1996] LRLR 310, 314-5 (Langley J).

NOTE: for RRC 4 use of and commentary on the defined phrases, see each phrase's entry at *ibid.*, Sch. 2, §1. RRC 4 references to Members include to former Members: RRC 4, Sch. 2, §2(f)(i).

underwriting members of Lloyd's: infelicitous: some, possibly most, "Closed Year Names" were not (and in some, probably most, cases could not have been) Members as at September 3, 1996, the object of buying conventional outward-RTC being to be thereafter permitted self-regulatorily to leave Membership and actually to do so (which conclusive, unconditional termination then raises self-regulatory jurisdictional issues if the Council then purports to bind the terminatee, especially in relation to conventional outward-RTC).

members of one or more ...: infelicitous: see relevant annotation to "the underwriting members of Lloyd's comprising the syndicates specified in schedule 1 ..." above.

syndicates reinsured to close ... into the Syndicates: infelicitous, erroneous and misleading: (1) a syndicate properly so called does not buy or sell RTC and is not RTCed into anything: the RRC 4, Sch. 2, §1 definition of "syndicate" creates error; (2) the provision is terminologically and logically inconsistent with relevant RRC 4, Sch. 2 §1 definitions: for example, a RRC 4, Sch. 2, §1-defined "syndicate" (a group of people) cannot be RTCed by an *ibid.*-defined "Syndicate" (a year of account).

whether directly or indirectly: correct: "Closed Year Name" covers any generation of conventionally-outward-RTCed SYA participant conventionally-inwardly-RTCed by a "Name".

Closed Year Syndicate: defined repetitiously at RRC 4, Sch. 2, §1.

Closed Year Names: defined repetitiously at RRC 4, Sch. 2, §1.

acting through the Substitute Agent: see parties section, annotation to "Additional Underwriting Agencies (No. 9) Limited".

THE SOCIETY incorporated by Lloyd's Act 1871 by the name of LLOYD'S of One Lime Street, London EC3M 7HA (*Lloyd's*);

NOTE: For RRC 4 use of "Lloyd's", see the entry "Lloyd's" in *ibid.*, Sch. 2, §1.

Society: erroneous: the Corporation is not and never has been a society; it is a statutory corporation. The statutory abbreviation "Society" in Lloyd's Acts 1871-1982 *passim* is misconceived. The "Society of Lloyd's" is a myth.²²

EQUITAS LIMITED a limited company registered in England and Wales with company number 3173352 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (*Equitas*);

NOTE: for RRC 4 references to Equitas Ltd., see *ibid.*, recitals (G) and (I); §§2.1(b)(i), (ii), (iii), (iv); 2.1(e), 3.6, 3.11(c), 4.7, 7.3, 9.3, 15.4, 24; *ibid.*, Sch. 2, §1 definition of "Completion Accounts and Co-operation Agreement"; "EATD"; "EAUSCA"; "ECTD"; "Lioncover Reinsurance"; "Notice of Requirements"; "Overseas Deposit Deed"; "Reinsurance Indemnities"; "Retrocession Agreement"; "Retrocession Obligation"; "Return on Surplus"; "Run-off Administration Agreement"; "Segregated Account Assets"; "Segregated Account Return"; "Subscription Agreement"; *ibid.*, Sch. 3, §§2.1(c); 5.2; 8.1; 13.1; 13.2; 14; *ibid.*, Sch. 5, §2, definition of "Available Surplus"; §3.2; §5. Equitas Ltd. is party to RRC 4 in order to (among other things) "undertake"²³ to Names that it will exercise its relevant RRC 5 powers in good faith. In the event, Equitas Ltd. does not "undertake"²⁴ but "acknowledges and agrees"²⁵

20-22 Bedford Row, London WC1R 4JS: obsolete: Equitas Ltd.'s registered office is presently 33 St. Mary Axe, London EC3A 8LL.²⁶

ADDITIONAL UNDERWRITING AGENCIES (No. 10) LIMITED a limited company registered in England and Wales with company number 2666936 whose registered office is at Lloyd's of London, One Lime Street, London EC3M 7HA and LLOYD'S, each in their capacity as trustees of the Premiums Trust Funds of the Names and the Closed Year Names (the *Managing Agent's Trustees*); and

NOTE: repetitiously defined at RRC 4, Sch. 2, §1; *q.v.* for annotation.

Agencies: infelicitous: AUA 10 is only one agency entity.

Premiums Trust Funds: see now FSA Lloyd's Rulebook, §10.3.1; historically, see (now repealed) Insurance Companies Act 1982, s.83(2). And see *Lloyd's v Robinson* [1999] 1 WLR 756 (HL) on appeal from [1997] LRLR 1 (CA).

EQUITAS POLICYHOLDERS TRUSTEE LIMITED a limited company registered in England and Wales with company number 3243970 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (the *Trustee*).

NOTE: for RRC 4 use of "Trustee" *simpliciter*, see *ibid.*, §§3.4, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.9, 4.10, 17(a)(vi), 24; *ibid.*, Sch. 3, §10.1. And see RRC 7 *passim*.

²² See p.184.

²³ *SOD*, p.99 ("Equitas Limited will be a party to the Reinsurance Contract [RRC 4] in order to undertake to Names that it will act in good faith in the implementation of any proportionate cover plan").

²⁴ There is no reason why it should not have "undertaken": other RRC 4 parties "undertake", as at (for example) RRC 4, §§3.5, 4.4, 6.4, 7.1, 7.2, 7.3, 9.1, 11.2, 14.1, 14.2, etc.

²⁵ RRC 4, §3.6.

²⁶ Equitas Ltd. 363s March 12, 2001 annual return as at March 11, 2001, p.1.

20-22 Bedford Row, London WC1R 4JS: obsolete: Equitas Policyholders Trustee's registered office is presently 33 St. Mary Axe, London EC3A 8LL.²⁷

WHEREAS:

- (A) The Council has power to carry into effect the Equitas Scheme, pursuant to the Reconstruction and Renewal Byelaw, for the reinsurance by ERL of all liabilities under contracts of insurance underwritten at Lloyd's and allocated to the 1992 year of account or any prior year of account and has directed that such reinsurance in respect of the Syndicates and the Closed Year Syndicates be effected by and subject to the terms and conditions of this Agreement in respect of all such contracts of insurance other than life business.

The Council has power: see generally Lloyd's Act 1982, s.6 and *ibid.*, Sch. 2 (some particular purposes for which the Council is empowered to promulgate byelaws).

reinsurance: see principally RRC 4, §3.

of all liabilities under contracts of insurance underwritten at Lloyd's: see RRC 4, §3.2.

year of account: error for "underwriting year": there is no such thing at Lloyd's as "the year of account" *simpliciter*.

and has directed: not without controversy.²⁸

life business: Life products were excluded: see the summary at *SOD*, p.123.

- (B) In contemplation of this Agreement, Managing Agents have entered into Supervisory Management Agreements and Information and Administration Agreements with ERL and Lloyd's in relation to the management of the Syndicate 1992 and Prior Business of the Syndicates.

NOTE: see RRC 4, Sch. 2, §1, the entries "Information and Administration Agreement" and "Supervisory Management Agreement" (RRCs of marginal relevance after the Effective Date).

- (C) The Substitute Agent was appointed to act as substitute managing agent for the Names and the Closed Year Names on the terms set out in the Substitute Agent's Appointment and in relation to, inter alia, the Syndicate 1992 and Prior Business of each Syndicate and each Closed Year Syndicate by a direction made by the Council pursuant to the Substitute Agents Byelaw (No. 20 of 1983).

for the Name: on AUA 9 acting for "Names", see RRC 4, parties, "Additional Underwriting Agencies (No. 9) Limited".

for ... the Closed Year Names: that AUA 9 was appointed as *extraordinary* managing agency ("substitute" is inaccurate if no relevant managing agency relationship existed at the time of the appointment) for Closed Year Names — many of whom must have ceased to be Members and thus ceased (in any meaningful sense, if at all) to have any managing agency — indicates self-regulators' at Lloyd's belief that self-regulatory jurisdiction over a former Member continues notwithstanding termination of Membership (the Council acted similarly in relation to PCW SYA participants). There appears to be no general law (and no express Rulebook at Lloyd's provision) supporting that belief. Since conventional outward RTC extricates the outward-RTCd SYA participant, there can be no legal or financial basis whatever for his continuing involvement in those liabilities, *a fortiori* if there is no basis on which to impeach the RTC transaction.

- (D) The Substitute Agent is entering into this Agreement with ERL for itself and as agent for the Names and the Closed Year Names in conformity with directions of the Council to the Substitute Agent and to the Names and the Closed Year Names under paragraph 4 of the Reconstruction and Renewal Byelaw on the basis (inter alia) that the Reinsurance Obligation is conditional upon satisfaction of the conditions in clause 2.

for itself: for RRC 4 provisions concerning AUA 9 in a personal capacity, see for example *ibid.*, recital (C), (D), §§2.1(b)(iv), 3.11(a), 4.8, 5.5, 6.6, 6.9, 7.1, 12, 14.1, 14.2, 17, 22.1, 24.

as agent: for RRC 4 provisions concerning AUA 9 in its capacity as agent for EquitasRe-reinsured SYA participants, see for example *ibid.*, parties "underwriting members of Lloyd's ... the Names ... acting through the Substitute Agent"; parties "underwriting members of Lloyd's ... the Closed Year Names ... acting through the Substitute Agent"; recital (C), (D), §§3.11(a), (b), (c); 4.3, 5.1(b)(i)(B); (ii)(B), (iv); 5.8, 6.1, 6.4, 6.5, 6.6, 6.9, 6.15, 6.16, 7.3, 9.1, 9.2, 10.3, 11.1, 11.2, 11.3, 11.4, 12, 14.1, 15.1, 15.2, 15.3(a), (c), (d), 16, 17, 19.2, 22.1, 25.2; Sch. 4, *passim*.

for ... the Closed Year Names: see relevant annotation to RRC 4, recital (C).

- (E) The Board of ERL has resolved to enter into this Agreement and, conditionally on the satisfaction of the conditions set out in clause 2, to reinsure the Syndicates and the Closed Year Syndicates in re-

²⁷ Equitas Policyholders Trustee 363s undated annual return as at August 23, 2000, p.1.

²⁸ See for example *Price and Price v Lloyd's* [2000] Lloyd's Rep IR 453 (Colman J); *Lloyd's v Leighs* {1a} [1997] CLC 759 (Colman J); *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398 (CA); *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA); and see *Lloyd's v Jaffray* {1} [1999] Lloyd's Rep IR (Colman J); *Lloyd's v Jaffray* {2b} (Court of Appeal, July 26, 2002) on appeal from [2000] CLC 725 (Cresswell J).

spect of 1992 and Prior Business in consideration, inter alia, in the case of each Syndicate, of the payment of the Syndicate Premium and the transfer of the Segregated Account Assets subject to and in accordance with the terms of this Agreement.

The Board of ERL has resolved: Equitas Re's board is discussed elsewhere.²⁹ Equitas Re's board resolving that Equitas Re accept the "Reinsurance Obligation" was a condition precedent to RRC 4: see *ibid.*, §2.1(d). On other relevant determinations by Equitas Re's board, see for example *ibid.*, §2.1(a), (c); Sch. 2, §1 definition of "Interim Proportionate Cover Declaration"; Sch. 3, §§2.1(a), (b), 2.2, 2.4, 6.3, 8.2, 14; Sch. 5, §2 definition of "Annual Adjustment", §§3.2, 5. Equitas Holdings' board on September 3, 1996 approved Equitas Re's board: (1) determining (subject only to DTI consent) to accept unconditionally the reinsurance obligation set out in the Reinsurance Contract; (2) making such determinations as may be necessary to satisfy the conditions set out in the Reinsurance Contract.³⁰

to reinsure: see RRC 4, §3.

Closed Year Syndicates: multiply erroneous: to the extent that the RRC 4, §3 product is reinsurance, a Closed Year Name has no liability capable of being outwardly reinsured. To the extent it is RTC, it has already been outwardly RTCed. And see RRC 4, §3.3.

transfer: see RRC 4, Sch. 4.

- (F) The Council has resolved that a reinsurance contract with ERL in the terms of this Agreement (alone or, in the case of any Syndicate which includes business other than 1992 and Prior Business, taken together with another designated contract or contracts of reinsurance) will constitute reinsurance to close as at the Inception Date.

NOTE: this passing, non-operative reference to the Council's decision is RRC 4's only relevant³¹ mention of RTC. The notion that, so far as concerns the EquitasRe-reinsured SYA participant,³² RRC 4 is a curious, inconsistent or incompatible mixture of "reinsurance"³³ *simpliciter* and "reinsurance to close"³⁴ should be eschewed. The EquitasRe-reinsured SYA participant can be outwardly reinsured and then outwardly RTCed in the same transaction. He cannot be outwardly RTCed and then outwardly reinsured since the outward RTC extricates him from all outwardly reinsurable liability.

will constitute: viz., that the RRC 4, §3 product³⁵ happens to have been deemed elsewhere³⁶ to be self-regulatorily considered to amount for certain purposes to RTC. The only basis on which a transaction can be RTC is 100% recourse to the Central Fund.³⁷ of which RRC 4 makes no mention.

reinsurance to close: no distinction is made in the recital between the deemed RTC sold by Equitas Re at RRC 4, §3 and conventional RTC, suggesting that the two forms are identical, at least in their relevant effects.

as at the Inception Date: the Inception Date is December 31, 1995. Conventional RTC takes effect as at January 1 of the relevant calendar year.

- (G) ERL will, on even date herewith, enter into the Retrocession Agreement with Equitas for the retrocession by ERL to Equitas of its liabilities hereunder and under the Centrewrite Reinsurance, the E&O Companies Reinsurance, the PSL Companies Reinsurance and the Illinois Collateral Reinsurance and the delegation of the run-off of such liabilities to Equitas, in the form set out in Appendix 2.

Retrocession Agreement: viz., RRC 5.

will ... enter into the Retrocession Agreement: whereas RRC 4 (at *ibid.*, §9.3) expressly empowers Equitas Re to delegate its RRC 4, §9.1 run-off agency function to Equitas Ltd., it contains no equivalent provision empowering Equitas Re to buy retrocession from anyone.

²⁹ See p.28.

³⁰ See September 11, 1997 Record of [September 3, 1996] Decision[s] filed at Companies House by Equitas Re.

³¹ RRC 4 does use — but not in the context of the RRC 4, §3 product — "reinsurance to close" (at for example *ibid.*, §3.3) and "reinsured to close" (for example *ibid.*, definition of "closed Year Syndicate"; *ibid.*, Sch. 2, §1, within the definitions of "1992 and Prior Business", "Closed Year Syndicate", "reinsurance to close", "Syndicate 1992 and Prior Business", and "Syndicate Reinsurances").

³² So far as concerns Centrewrite Reinsurance, the E&O Companies Reinsurance, the PSL Companies Reinsurance and the Illinois Collateral Reinsurance (as defined), there is no curiosity since RTC is not appropriate in the first place.

³³ See for example RRC 4, title, the name "Equitas Reinsurance Limited", recitals (A), (F), (G), (J), *ibid.*, Part I heading[s]; *ibid.*, §§3.2, 9.1; "Reinsurance Indemnities", "Reinsurance Obligation", "Reinsurance Trigger Event", "Syndicates Reinsurances" *passim*; *ibid.*, Sch. 2, §1, within the definitions of "Equitas Scheme" and "Reinsurance Indemnities"; *ibid.*, Sch. 5, §§3.2, 4.

³⁴ See p.207.

³⁵ On the nature of the RRC 4, §3 product, see p.A38 *et seq.*

³⁶ See p.151

³⁷ See p.151 *et seq.* 100% recourse to the Central Fund is the defining feature of conventional RTC.

delegation of the run-off: viz., Equitas Re's RRC 4, §9 functions. Cf. Equitas Re's retrocession to Equitas Ltd. of Equitas Re's *ibid.*, §3.1 reinsurance obligations. RRC 5 deals with both matters (RRC 5, §§2 and 5 respectively). RRC 4, §9.3 expressly empowers Equitas Re to and envisages that it will delegate its *ibid.*, §9.1 run-off agency functions to Equitas Ltd.

- (H) This Agreement is executed as a deed by ERL, Lloyd's and the Substitute Agent for the purpose, inter alia, of extending the benefit of the acknowledgments contained in clause 3.11 to the Managing Agents.
- (I) Pursuant to applicable regulatory requirements, ERL and Equitas will enter into the EATD, the ECTD and any other necessary Overseas Deposit Deed to provide security in the United States, Canada and any relevant foreign jurisdictions respectively for the obligations hereunder.

EATD: see this book, Appendix 2.1.

applicable regulatory requirements: these are discussed elsewhere.

security: viz., securitisation of Equitas Re's discharge by payment of EquitasRe-reinsured liabilities.

- (J) This Agreement is to take effect as a contract of reinsurance and shall have no effect on the liability of any Name or Closed Year Name under any original contract of insurance entered into by such Name or Closed Year Name. The liability of the relevant Names or Closed Year Names under all contracts of insurance underwritten by them shall remain several and not joint.

to take effect as a contract of reinsurance: see elsewhere.³⁸

no effect on the liability of any Name ... under any original contract of insurance entered into by such Name: problematic if the RRC 4, §3 product truly is (rather than being merely treated for some purposes as) RTC.³⁹

no effect on the liability of any ... Closed Year Name under any original contract of insurance entered into by such ... Closed Year Name: erroneous: the wording does not accurately reflect how conventional RTC works;⁴⁰ a conventionally outwardly-RTCd *originalis* — for that matter, any conventionally outwardly-RTCd SYA participant — is *never* liable on the original insurance contract or any other conventionally outward-RTCd liability.⁴¹

The liability of the relevant Names or Closed Year Names under all contracts of insurance underwritten by them shall remain several and not joint: a *non sequitur* to the preceding sentence. Merely a précis of Lloyd's Act 1982, s.8(1).⁴²

several and not joint: see similarly RRC 4, §5.7; LATD, §9.1. RRC 4 would not in any event be able to override Lloyd's Act 1982, s.8(1) (which would presumably prevent compliance with a judgment that two or more SYA participants be jointly-and-severally liable on a particular insurance contract). Equitas Re's internal financial agglomeration of individual EquitasRe-reinsured SYA participants' individual Equitas reinsurance premiums: (1) makes difficult, or makes difficult the ascertaining of, the relevant EquitasRe-reinsured SYA participant's (already passive, *per* the SYA-level passivity rule) compliance with Lloyd's Act 1982, s.8(1); (2) impedes it from keeping proper accounts for each individual EquitasRe-reinsured SYA participant (of which there are hundreds of thousands if not millions).

- (K) The Syndicate Premium for each Syndicate has been calculated by reference to the value of its Syndicate 1992 and Prior Business and the assets held in respect thereof as at the Inception Date.

has been calculated: on the Equitas Reserving Project, which quantified EquitasRe-reinsurance premiums, see elsewhere.⁴³

IT IS HEREBY AGREED AS FOLLOWS:

DEFINITIONS AND INTERPRETATION

1. The words and expressions used in this Agreement shall have the meanings set out in paragraph 1 of schedule 2, and terms and provisions used in this Agreement shall be interpreted in accordance with paragraph 2 of schedule 2.

³⁸ See p.A39.

³⁹ See p.151.

⁴⁰ See p.207.

⁴¹ See p.207 *et seq.*

⁴² See p.180.

⁴³ See p.31.

PART I — REINSURANCE

REINSURANCE CONDITIONS

Conditions

- 2.1 The obligations of ERL under clause 3 and the provisions of clause 9 shall in all respects be conditional upon the satisfaction by not later than 28 February 1997 of each of the following conditions:

NOTE: RRC 4 was also conditional on a sufficient number of RRC 1 “Accepting Names”.⁴⁴ *SOD* appears to indicate⁴⁵ that RRC 4 was conditional on RRC 1’s conditions⁴⁶ being satisfied.

The obligations of ERL under clause 3 and the provisions of clause 9: a rare RRC 4 juxtaposition of Equitas Re’s two separate (and often confused) RRC 4 functions.

- (a) the Board of ERL making a determination that it has received or will receive sufficient consideration, or that it has received sufficient undertakings in form and substance satisfactory to it as to discharge of the consideration for the assumption of the Reinsurance Obligations, so as to enable ERL to accept the Reinsurance Obligation unconditionally;

consideration: see RRC 4, §§5, 6; *ibid.*, Sch. 4, *passim*.

- (b) each of the Council and ERL making a determination that, so far as it is aware, there are no circumstances which would be likely to have a material adverse effect on the business and prospects of ERL, including but not limited to:

no circumstances which would be likely to have a material adverse effect on the business and prospects of ERL: mentioned in *SOD*.⁴⁷

- (i) the failure or inability of ERL or Equitas to obtain, or the lapse, invalidation or withdrawal of, or the receipt by ERL or Equitas of any notice of an intention to revoke or not to renew, any authorisation, order, recognition, grant, consent, licence, confirmation, clearance, permission, approval, exemption or determination necessary for or in respect of the Equitas Scheme (the absence of which would be likely to have a material adverse effect on the business or prospects of ERL or Equitas) from any appropriate government, governmental, quasi-governmental, supranational, statutory or regulatory body or court;

NOTE: Equitas Re’s authorisation by external insurance regulators in the UK (then the DTI) and elsewhere (especially New York) was an essential precondition. And see RRC 4, §2.1(e).

- (ii) any action, proceeding, suit, investigation, enquiry or other step having been decided upon, taken, instituted, implemented or threatened by any government, governmental, quasi-governmental, supranational, statutory or regulatory body, any court or any other person or body or any unfavourable order or judgment having been handed down in any existing proceedings (of whatever nature) which would in any material respect render unlawful, void or unenforceable any material aspect of the Equitas Scheme or limit, interfere with or adversely affect to a material extent the ability of ERL or Equitas to conduct

⁴⁴ See generally *SOD*, p.1: “If the conditions of the Settlement Agreement [RRC 1] are satisfied, the reinsurance into Equitas will be mandatory for all Names whether or not they accept the settlement offer”. And see *SOD*, July 30, 1996 cover letter from the Corporation’s then CEO, p.iii-iv:-

The mandatory reinsurance into Equitas will not become unconditional until sufficient acceptances of the settlement offer have been received and the relevant provisions of the Notices of Requirements (which, inter alia, set out the requirements of the DTI which must be complied with before Equitas can accept the reinsurance of the 1992 and prior liabilities) have been satisfied. These requirements include the need for the DTI to be satisfied that Equitas will receive the full additional Equitas premium payable by Names. The decision to declare the Settlement Agreement and the reinsurance into Equitas unconditional will be made by the Council and the board of Equitas, in consultation with the DTI, as soon as practicable after 28 August 1996. Depending on the level of acceptances of the settlement offer there is a risk that the authorisation may be delayed until sufficient of the Equitas additional premium has been paid by Names or Lloyd’s is able to arrange additional funding for Equitas.

⁴⁵ *SOD*, p.1.

⁴⁶ See RRC 1, §2.

⁴⁷ See *SOD*, p.97:-

Equitas Reinsurance is not unconditionally committed to enter into the Reinsurance Contract. It will be necessary for Equitas to review known developments in relation to the business which it is to reinsure, which may affect the liabilities which it would assume if it entered into the Reinsurance Contract. Equitas will also need to review any other factors which may materially affect its ability to perform its obligations under the contract.

its business or materially and adversely affect its liabilities or otherwise materially and adversely affect the business or prospects of ERL or Equitas;

NOTE: US state securities regulators' suits were settled in the State Agreement; see also NASAA Agreement⁴⁸ (Tennessee, specifically mentioned in *SOD*,⁴⁹ was a late settler). *Allen v Lloyd's* failed at the Court of Appeals⁵⁰ at R&R's eleventh hour. Self-regulators-at-Lloyd's regarded the threat from English refuseniks litigating in England as minimal.

- (iii) any statute, regulation or order having been enacted, made or proposed by any government, governmental, quasi-governmental, supranational, statutory or regulatory body which would in any material respect render unlawful, void or unenforceable any material aspect of the Equitas Scheme or limit, interfere with or adversely affect to a material extent the ability of ERL or Equitas to conduct its business or materially and adversely affect its liabilities or otherwise materially and adversely affect the business or prospects of ERL or Equitas;

NOTE: no such statute etc. presently known.

- (iv) any material fact, matter or circumstance having been disclosed to ERL or Equitas by the Substitute Agent or any Managing Agent, or ERL or Equitas having become aware that any disclosure or representation made to ERL or Equitas by the Substitute Agent or any Managing Agent in relation to any material fact, matter or circumstance was materially incomplete or inaccurate when made, which fact, matter or circumstance would adversely affect to a material extent the ability of ERL or Equitas to conduct its business or otherwise materially and adversely affect the business or prospects of ERL or Equitas;

NOTE: after RRC 4 execution, Equitas Re has little if any recourse: see *ibid.*, §3.9. See also *ibid.*, §3.11(a), (b).

by the Substitute Agent or any Managing Agent: viz., for example, in the course of AUA 9 performing RRC 14, or a managing agency performing RRC 2 or RRC 8.

- (c) the Board of ERL making a determination that there has not been any change or deterioration in the 1992 and Prior Business or in the assets held in Premiums Trust Funds, LATFs or LCTFs in respect thereof between the Run-off Date and the first date on which all other conditions in this clause 2.1 are satisfied which would, alone or in conjunction with other matters, be likely to have a material adverse effect on the ability of ERL to pay its debts as and when they become due if this Agreement were to become unconditional in accordance with its terms, disregarding for this purpose clause 3.5 and schedule 3;

not been any change or deterioration in the 1992 and Prior Business: mentioned in *SOD*.⁵¹

- (d) the Board of ERL resolving that ERL unconditionally accepts the Reinsurance Obligations subject to receipt of consent from the Secretary of State pursuant to the relevant provisions of the relevant Notice of Requirements; and

NOTE: see RRC 4, recital (E). Equitas Re's board is discussed elsewhere.⁵²

consent: see for example RRC 4, §2.1(e). For other RRC 4 use of "consent" in the regulatory context, see *ibid.*, §2.1(e), 2.2, 5.1(d); Sch. 5, §3.1.

- (e) ERL and Equitas each having received consent from the Secretary of State pursuant to the relevant Notice of Requirements to accept unconditionally the Reinsurance Obligation and the Retrocession Obligation respectively.

consent from the Secretary of State: The Secretary of State for Trade and Industry, the political head of the DTI, authorised Equitas Re and Equitas Ltd. on March 29, 1996.⁵³

Reinsurance Obligation: see generally RRC 4, 63.1 *et seq.*

Retrocession Obligation: see generally RRC 5, §2.1 *et seq.*

⁴⁸ See for example *SOD*, p.4-5, 16-17, App. 3, p.23-24

⁴⁹ See for example *SOD*, the Corporation's then CEO's July 30, 1996 cover letter, p.v.

⁵⁰ *Allen v Lloyd's*, 94 F.3d 923 (4th Cir. 1996).

⁵¹ *SOD*, p.97 ("Once the Reinsurance Contract has been signed, it will be subject to the final DTI consent and to a 'no material change' condition and to certain other conditions of a similar nature, which will need to be satisfied before the Reinsurance Contract can become unconditional").

⁵² See p.28.

⁵³ *SOD*, p.80.

Termination on failure to satisfy conditions

- 2.2 If the conditions set out in clause 2.1 have not been satisfied by 28 February 1997 or ERL (with the prior written consent of the Council) gives written notice to the Substitute Agent prior to such date that any of such conditions is not capable of being satisfied, this Agreement shall thereupon terminate in accordance with clause 19.

NOTE: obsolete: all relevant conditions were satisfied.

THE REINSURANCE OBLIGATION

NOTE: RRC 4 is insistent that the RRC 4, §3 product is reinsurance: see for example *ibid.*, recital (J); *ibid.*, title to Part I and its sub-parts (“Reinsurance”; “Reinsurance Conditions”; “The Reinsurance Obligation”); RRC 4, §3.1 (“[Equitas Re] shall ... reinsure and indemnify each and every Syndicate and each Closed Year Syndicate ...”); *ibid.*, §3.2 (“The reinsurance and indemnity obligation of [Equitas Re] shall be to indemnify without limitation in time and amount ... by way of reinsurance”) etc.

Scope of reinsurance obligation

- 3.1 ERL shall, in consideration of:

ERL: *viz.*, not Equitas Ltd.

consideration: see RRC 4, §§5, 6; *ibid.*, Sch. 4. The consideration is on the same lines as the consideration for conventional RTC.⁵⁴

- (a) the obligation to transfer the Segregated Account Assets held in respect of each and every Syndicate;

NOTE: see RRC 4, Sch. 4, §1.1 *et seq.*

- (b) the obligation of the Names to pay their Name’s Premiums;

NOTE: see also RRC 4, §§3.10, 3.11(a), (b), (c), 5.1(b), 5.3, 5.5, 5.5(a), (b), (c), 5.6, 5.7, 5.8, 5.10, 6.12, 7.2, 8(a), (b), 18. Each RRC 1 Accepting Name paid a single EquitasRe-reinsurance premium. Equitas Re has released him from all obligation to provide any further money: see RRC 1, §6.4. The RRC 1 Accepting Name has also been comprehensively released from relevant back-office financial obligations: see for example RRC 1, §5.1 (release by his relevant members’ agency), *ibid.* (release by each of his relevant managing agencies), *ibid.*, §§3.3-3.4 (various releases by the Corporation).

Names: *cf.* Closed Year Names. No Closed Year Name was required to pay, and did not pay, any EquitasRe-reinsurance premium (the conventional RTC premium that each Closed Year Name has already paid for conventional outward-RTC is forever sufficient to cover all conventionally outward-RTCd liabilities).

- (c) the obligation of the Names to assign the rights granted to ERL pursuant to clause 6; and

- (d) the obligation of the Names to assign the rights specified in clause 5.1(d),

reinsure and indemnify each and every Syndicate and each Closed Year Syndicate by payment in accordance with clause 3.4 and otherwise upon and subject to the terms and conditions of this Agreement.

NOTE: see RRC 4, Sch. 2, §1 definition of “Reinsurance Indemnities”. “believed to be the largest single series of reinsurance transactions ever written by any one company”: *SOD*, p.81.

reinsure and indemnify: elucidated at RRC 4, §3.2. RRC 4 uses ‘reinsured’⁵⁵ *simpliciter* similarly.

each and every Syndicate: neither a syndicate nor a SYA properly so called can be reinsured or indemnified against anything.

each Closed Year Syndicate: error:⁵⁶ see the annotation to RRC 4, Sch. 2, §1 definition of “Closed Year Name”. And see RRC 4, §3.3.

payment in accordance with clause 3.4: *viz.*, by personally being the funding source, or by personally procuring the funding of payment from some other funding source, as prescribed in RRC 4, §3.4. See the similar use of “pay” at *ibid.*, §3.2. *Cf.* the different use of “pay” at (for example) *ibid.*, §9.2(a).

- 3.2 The reinsurance and indemnity obligation of ERL shall be to indemnify without limitation in time and amount, subject to and in accordance with the remainder of this clause 3, each Syndicate and

⁵⁴ See for example SUA 1 / SCA 1, §9.2A: “A decision by the Agent to close a year of account in accordance with clause 5(da) shall be effected by the Agent by the inclusion in the underwriting account of the Managed Syndicate for the next succeeding year of account of an amount representing a provision for all known and unknown liabilities attributable to the year of account which is closing.”

⁵⁵ See for example RRC 4, §§4.3, 6.13, Part II heading; “Financial Reinsurances”, “Reinsured Names”, “Reinsured Parties”, *passim*; *ibid.*, Sch. 2, §1, within the definitions of “Reinsured Parties” and “Secured Obligations”.

⁵⁶ See also the error at for example *SOD*, p.123 (italics added): “Equitas will reinsure those Names who are ... on open and closed 1992 and prior years of account in respect of all 1992 and prior business”.

each Closed Year Syndicate from and including the Effective Date, by way of reinsurance, in respect of all liabilities, losses, claims, returns, reinsurance premiums, costs and other liabilities including extra-contractual obligations or punitive or penal damages arising in relation to the Syndicate 1992 and Prior Business of that Syndicate or Closed Year Syndicate, after deduction of:

NOTE: this is RRC 4, §3's principal substantive operating provision; see the corresponding provision at RRC 5, §2.3. The brevity of the engagement resembles contemporaneous RTC contract wording⁵⁷ and SUA 1 / SCA 1 wording⁵⁸ more than conventional outward reinsurance. Similarly to conventional RTC, Equitas Re comprehensively assumes all EquitasRe-reinsured obligations, unconditionally rather than (for example) "as original", "follow the settlements", "follow the fortunes", or with any other reinsurance contractual overlay. Equitas Re has no power to unilaterally amend any EquitasRe-reinsured insurance contract or (arguably) to countermand any relevant established course of dealing at Lloyd's.

to indemnify: Equitas Re's RRC 4, §3.2 inherent and implied discretions as a principal reinsurer are separate from its *ibid.*, §9.2 express discretions as *ibid.*, §9 run-off agent.

without limitation in time: *viz.*, however old the insurance contract (if otherwise valid and subsisting).

without limitation ... in amount: *viz.*, the only limitation is Equitas Re's assets. RRC 4 does not require the EquitasRe-reinsured SYA participant to have any retention.

each Closed Year Syndicate: error: see RRC 4, §3.4, and annotation to RRC 4, Sch. 2, §1 definition of "Closed Year Name". And see RRC 4, §3.3.

by way of reinsurance: not dissimilar contractual wording between SYA participants and a conventional insurance company (such as Equitas Re appears to be) has been held to be 100% stop loss insurance rather than reinsurance.⁵⁹ In view of the (in practice) complete absence of risk to such EquitasRe-reinsured SYA participant (extricated⁶⁰ at SYA level by conventional RTC) as has ceased to be a Member (extricated, apparently, from self-regulators'-at-Lloyd's jurisdiction), query if the RRC 4, §3 product can be any species of insurance.⁶¹ In any event, akin (but not identical) to the position in conventional RTC, the EquitasRe-reinsured SYA participant pays no claim and is never reimbursed by Equitas Re.

all liabilities, losses, claims, returns, reinsurance premiums, costs and other liabilities: on Equitas Re's simultaneous run-off agency functions in relation to such matters, see RRC 4, §9.2(a) *et seq.*

punitive ... damages: *cf.* Equitas Re's personal liability under RRC 4, §10.2 for punitive and penal damages in the context of its *ibid.*, §9 run-off agency functions. Such claim components are expressly not recoverable under Lloyd's US Surplus-Lines Common-Use Trust Deed, §§1.3 and 2.3(e) and Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §§1.3 and 2.3(e). EATD and LATD contains no such restrictions.

or Closed Year Syndicate: error: see annotation to RRC 4, Sch. 2, §1 definition of "Closed Year Syndicate".

- (a) all amounts recoverable and actually recovered after the Effective Date in respect of the relevant Syndicate Reinsurances; and

NOTE: this should be read in conjunction with RRC 4, §§6.1 and 6.4; *cf.* RRC 5, §2.3(a). To the extent of any outward reinsurance, an EquitasRe-reinsured SYA participant is not an "Insurance Creditor" of Equitas Re.⁶²

actually recovered: in relation to all and any outward reinsurance, Equitas Re is not entitled to bring into account theoretical, prospective or possible outward reinsurance recoveries, and is required to bring into account all actual outward reinsurance recoveries.

- (b) all other income receivable and actually received after the Effective Date, including premiums, return premiums, salvages, claim refunds or other moneys which may be applied in reducing

⁵⁷ See the RTC contract quoted at p.151. On the requirement for a conventional RTC contract to be in writing, see for example SUA 1 / SCA 1, §9.2:-

A decision by the Agent to close a year of account [in accordance with §5(d)] shall be effected by the Agent, through the active underwriter of the Managed Syndicate or some other duly authorised officer of the Agent, executing a written memorandum of the terms of the contract of reinsurance to close. Upon the execution of the memorandum the contract of reinsurance to close shall be binding on the reinsuring members and the reinsured members ..., and after such execution the Agent shall have no authority to cancel or vary the contract of reinsurance to close.

⁵⁸ See for example SUA 1 / SCA 1, §5(d)(i): "the reinsuring members agree to indemnify the reinsured members against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through the Managed Syndicate and allocated to the earlier year".

⁵⁹ *Toomey v Eagle Star Insurance Co. Ltd.* [1994] 1 Lloyd's Rep. 516 (CA) on appeal from [1993] 1 Lloyd's Rep. 429 (Judge Diamond QC).

⁶⁰ External insurance regulation holding that an outwardly-RTCD SYA participant retains liability for the outward-RTCD liability shows comprehensive misunderstanding of the course of business at Lloyd's and the provisions of relevant standard-form agency agreements and other Rulebook at Lloyd's provisions.

⁶¹ See for example *Medical Defence Union Ltd. v Department of Trade* [1979] 1 Lloyd's Rep. 499 (Megarry J).

⁶² See for example RRC 4, Sch. 2, §1 definition of "Insurance Creditor"; the priorities at RRC 4, Sch. 3, §12 (*cf.* those at RRC 5, Sch. 3, §12), RRC 7, §2.7.

the amount of any liability comprised in the Syndicate 1992 and Prior Business of that Syndicate or Closed Year Syndicate.

NOTE: *cf.* RRC 5, §2.3(b).

receivable: superfluous in view of “actually received”.

and actually received: in relation to all and any specified income other than outward reinsurance (see RRC 4, §3.2(a)), Equitas Re is not entitled to bring into account theoretical, prospective or possible other income, and is required to bring into account all actual other income.

In the performance of the Reinsurance Obligation in respect of any Syndicate or Closed Year Syndicate ERL shall have the obligation and responsibility for the collection of the amounts referred to in paragraphs (a) and (b) above and shall bear any risk of failure to collect such amounts. ERL shall pay, or procure payment of, amounts agreed or lawfully due and payable in respect of any Claim or otherwise due under clause 3.2 on behalf of the relevant Syndicate (or Closed Year Syndicate in the circumstances set out in clause 3.3).

NOTE: *cf.* RRC 5, §2.3.

or Closed Year Syndicate [first occurrence]: error: see annotation to RRC 4, Sch. 2, §1 definition of “Closed Year Syndicate”.

ERL shall pay: *viz.*, shall, to the extent required in RRC 4, §3.4, personally fund payment. See the similar use of “payment” at *ibid.*, §3.1 *Cf.* the entirely different use of “pay” at *ibid.*, §9.2(a).

or procure payment: *viz.*, procure funding of payment from a source other than Equitas Re. RRC 4, §3.4 specifies the funding source in ordinary circumstances. In relevant extraordinary circumstances, see for example *ibid.*, §4.10; RRC 7, §2.7.

amounts agreed: settlement is discussed elsewhere.⁶³

or lawfully due and payable: *viz.*, in the absence of agreement, 100% of the relevant liability.

- 3.3 The obligation of ERL to indemnify any Closed Year Syndicate in respect of 1992 and Prior Business pursuant to clause 3.1 shall only arise if the reinsurance to close of that Closed Year Syndicate shall have been set aside by a final order, not subject to further appeal, of any court of competent jurisdiction, or shall otherwise have ceased to have effect. In either event and on payment pursuant to such indemnification in respect of any liability comprised in 1992 and Prior Business, ERL shall have no further obligation pursuant to clause 3.1 in respect of such liability to any Syndicate or Closed Year Syndicate.

indemnify: infelicitous: see the “indemnify” annotation at RRC 4, §3.2.

Closed Year Syndicate: a syndicate properly so called is not capable of being either RTCed or indemnified: see the annotation at RRC 4, Sch. 2, §1’s definition of “Syndicate”.

shall only arise: correct: each relevant existing conventional RTC of a Closed Year Name — whether an *originalis* or any generation of conventionally outward-RTCed, previously inward-RTCing SYA participant — extricates him from all liability in relation to his conventionally outward-RTCed insurance contracts and thus (as RRC 4, §3.3 appears to recognise) of actual or potential liability capable of being outwardly reinsured, from which it equally follows that every RRC 4 mention is erroneous of a Closed Year Name either as a RRC 4, §3 reinsured or a party retaining or capable of retaining Equitas Re as *ibid.*, §9 run-off agent. Once conventionally-outward-RTCed, and provided the RTC contract is not avoided (unheard-of in practice), the SYA participant ceases for all purposes to have any relevance whatever to his own outward-RTCed liabilities. Those liabilities are entirely infiltrated to the next generation of inward-RTCing SYA participant, because of which Equitas Re is entitled to wholly disregard — and therefore need not exponentially cumulatively multiple-count — every Closed Year Name’s every conventionally-outward-RTCed liability.

of that Closed Year Syndicate: a syndicate properly so called is incapable of being RTCed: see the annotation to RRC 4, Sch. 2, §1’s definition of “Syndicate”.

set aside by a final order: presently believed never to have happened. The probability of a relevant conventional RTC transaction being avoided is extremely remote: all non-fraud limitation periods have expired, and the parties who would have to apply for the relevant order have in almost every case settled relevant claims in RRC 1. RRC 4’s every relevant use of “Closed Year Name” and “Closed Year Syndicate” is therefore inappropriate.

otherwise have ceased to have effect: inappropriate: conventional subsisting RTC never does cease to have effect.

or Closed Year Syndicate: were a relevant conventional RTC transaction to be avoided, the RRC 4 “Closed Year Syndicate” would become a “Syndicate”, the SYA the conventional outward-RTC of whose participants has unravelled is impliedly added to RRC 4, Sch. 1, and each such participant becomes a Name.

- 3.4 Unless the Trustee has made an election pursuant to clause 4.10, and subject to clause 3.8, ERL shall pay, or procure payment of any amount due under this clause 3, in the following manner:

⁶³ See p.84.

NOTE: this provision should be read in conjunction with the curiously located RRC 4, §9.4(c) (prohibiting payment in ordinary circumstances directly to any EquitasRe-reinsured SYA participant), and *ibid.*, §4, especially *ibid.*, §4.5 and (in the insolvency context) *ibid.*, §4.10. In a RRC 7, §2.15 Insolvency Event, RRC 4, §3.4's operation is overridden by RRC 7, §2.5 etc. Absent a relevant trust or other fund, the funding source is Equitas Re's personal funds (implicitly in *ibid.*, §3.4(d); explicitly at *ibid.*, (e)). RRC 4, §3.4 governs only the funding of a relevant payment, not (contrary to the implication in *ibid.*, §3.2, the reference there to *ibid.*, §3.4)) with Equitas Re's decision to honour a claim in the first place.

election: see RRC 4, §4.10.

shall: *viz.*, only to the extent that Equitas Re as a reinsurer happens to decide to honour a relevant liability in the first place: Equitas Re is not a mere deposit-taker.

pay: *viz.*, fund from its own personal assets.

procure payment: *viz.*, procure payment from some source other than Equitas Re's own personal funds, such as EATF. Those sources are listed at RRC 4, §3.4(a)-(d).

any amount due: *viz.*, any particular amount due to a particular EquitasRe-assured-at-Lloyd's in relation to a particular relevant claim. See further RRC 7, §4.7.

in the following manner: *viz.*, *cf.* the usual manner at Lloyd's, namely to the PTF of each outwardly-reinsured SYA participant according to actual claims on his own insurance contracts.⁶⁴ At RRC 4, §4.5, Equitas Policyholders Trustee as RRC 4, §4 assignee permits and directs Equitas Re to make payments according to *ibid.*, §3.4 instead.

(a) in the case of payments from the EATF, in accordance with the terms of the EATD;

EATF: *viz.*, money legally owned by the EATD trustee rather than Equitas Re's personal funds. Such payments cannot be the subject of a RRC 4, §4.10 notice because Equitas Re does not beneficially own EATF assets. In the event of proportionate cover, see the corresponding provision at *ibid.*, Sch. 3, §6.1(a)(ii).

in accordance with the terms of the EATD: *viz.*, at EATD, §4(a)(i) *et seq.* The EATD is discussed elsewhere.⁶⁵ Where a relevant claim is covered in the first place by (for example) the EATD, then the EATF is the source of funding rather than (solely) Equitas Re's personal funds, while the mechanism for transmitting claims money from the EATF to the EquitasRe-assured-at-Lloyd's is as prescribed in the EATD (as discussed at RRC 4, §3.4(a)).

(b) in the case of payments from the ECTF, in accordance with the terms of the ECTD;

NOTE: *viz.*, money legally owned by the ECTD trustee rather than Equitas Re's personal funds. Such payments cannot be the subject of a RRC 4, §4.10 notice because Equitas Re does not beneficially own ECTF assets. In the event of proportionate cover, see the corresponding provision at *ibid.*, Sch. 3, §6.1(a)(iii).

(c) in the case of payments from any Overseas Deposit Fund, in accordance with the terms of the relevant Overseas Deposit Deed;

NOTE: *viz.*, money subject to a relevant fund (other than the EATF and the ECTF) rather than part of Equitas Re's personal funds. Such payments cannot be the subject of a RRC 4, §4.10 notice. RRC 4, Sch. 3 particularly addresses relevant Australian liabilities: see *ibid.*, Sch. 3, §6.1(a)(iv).

(d) in the case of payments in respect of motor and/or employer's liability business of each of the Syndicates listed in schedule 6, to the Premiums Trust Funds of that Syndicate; and

NOTE: This deals with Equitas Re's payment of MO and or EL claims out of its personal funds. RRC 4, Sch. 6 lists relevant SYAs. RRC 4, §4.10 empowers Equitas Policyholders Trustee to require Equitas Re to make payments under this sub-clause directly to it in a RRC 7, §2.15 Insolvency Event. Such payments can be the subject of a RRC 4, §4.10 notice because they will presumably come from Equitas Re's own beneficially owned assets rather than from a relevant trust.

(e) in any other case, direct to the Insurance Creditors of the Syndicate 1992 and Prior Business of that Syndicate or Closed Year Syndicate or such other person as is entitled thereto,

NOTE: a claim not covered by RRC 4, §3.4(a)-(c) is to be made from Equitas Re's personal funds rather than from a relevant EquitasRe-side securitisation trust fund; and it is to be made to the EquitasRe-assured-at-Lloyd's direct (or other entitled person) rather than via a particular trust fund such as LATF (see RRC 4, §3.4(a)) or PTF (see *ibid.*, (d)). In a RRC 7, §2.15 "Insolvency Event", RRC 4, §4.10 empowers Equitas Policyholders Trustee to require Equitas Re to make payments under this sub-clause directly to it in a RRC 7, §2.15 Insolvency Event. RRC 4, §3.4 does not provide for any payment to be made to any EquitasRe-reinsured SYA participant: see *ibid.*,

direct: the EquitasRe-reinsured SYA participant expressly foregoes his right to receive relevant money from Equitas Re in its capacity of run-off agent: RRC 4, §9.4(c) (which properly belongs in *ibid.*, §3.4(e)).

provided that nothing in this clause 3.4 or any other provision of this Agreement shall be construed to mean that amounts agreed and lawfully due in respect of any Claim in respect of the Syndicate 1992 and Prior Business of any Syndicate are not payable until the aggregate ultimate net liability in

⁶⁴ *Cf.* conventional RTC, which has nothing to do with reinsurance: see p.207.

⁶⁵ see Appendix 2.1.

respect of that Claim has been ascertained and ERL shall, where necessary, advance payment of all such amounts.

NOTE: Equitas Re is not permitted to cavill at paying a claim on the ground only that aggregate ultimate net liability has not yet been ascertained. The provision requires Equitas Re to make appropriate advances.

agreed and lawfully due: presumably “agree and or lawfully due”.

- 3.5 If at any time a Certified Reinsurance Trigger Event or Automatic Reinsurance Trigger Event occurs, the liability of ERL to the Names and the Closed Year Names in respect of the Reinsurance Obligation (whether or not previously adjusted as a result of any prior operation of this clause 3.5) shall be adjusted subject to and in accordance with the provisions of schedule 3 PROVIDED THAT such adjustment shall only be made if an adjustment is or shall be made under and in accordance with the equivalent provisions in any other contract of insurance underwritten by ERL, including the Centrewrite Reinsurance, the E&O Companies Reinsurance and the PSL Companies Reinsurance. ERL undertakes not to underwrite any contract of insurance, other than the Illinois Collateral Reinsurance, which does not contain provisions equivalent to and having the same effect as those contained in this clause 3.5 and schedule 3.

NOTE: *cf.* RRC 5, §2.4. RRC 4, Sch. 3 is a back-office arrangement of no necessary direct concern to the EquitasRe-assured-at-Lloyd’s.

a Certified Reinsurance Trigger Event or Automatic Reinsurance Trigger Event: the “or” is significant in helping to clarify RRC 4, Sch. 3’s infelicitous drafting as to what constitutes a Proportionate Cover Plan.

shall be adjusted: the adjustment is compulsory: see RRC 4, Sch. 3, §3.1 etc. The deficit is the responsibility of the Lloyd’s enterprise, not the EquitasRe-reinsured SYA participant: see generally Chapter 3.

Closed Year Names: error: Equitas Re has no liability whatever to any Closed Year Name: see the annotation to RRC 4, Sch. 2, §1 definition of “Closed Year Name”, and RRC 4, §3.3.

Provided that ...: the proviso prohibits Equitas Re to create a class of Insurance Creditor in relation to the members of which proportionate cover is not an option.

- 3.6 ERL, in respect of any decision to adjust the liability of ERL to the Names or the Closed Year Names pursuant to this Agreement, and Equitas, in respect of any decision to adjust the liability of Equitas to ERL pursuant to the Retrocession Agreement, each acknowledges and agrees for the benefit of the Names and the Closed Year Names that such decision shall be taken bona fide and that all reasonable skill, care and diligence will be taken in arriving at any such decision.

NOTE: *cf.* RRC 5, §2.5.

decision: infelicitous: RRC 4, Sch. 3, §3.1 requires Equitas Re to adjust on the occurrence of a Reinsurance Trigger Event; no Equitas Re board discretion is involved.

adjust: see RRC 4, §3.5; *ibid.*, Sch. 3, §3.1 *et seq.*

the liability of ERL to the Names ... the liability of Equitas to ERL: there is no mention of liability of Equitas Re or of any EquitasRe-reinsured SYA participant direct to the assured-at-Lloyd’s: *cf.* SOD, for example p.99 (“insufficient assets to meet all future claims” — assureds’-at-Lloyd’s claims are meant, not EquitasRe-reinsured SYA participants’ RRC 4 claims against Equitas Re or Equitas Re’s RRC 5 claims against Equitas Ltd.).

Closed Year Names: error: Equitas Re has no liability whatever to any Closed Year Name: see the annotation to RRC 4, Sch. 2, §1 definition of “Closed Year Name”, and RRC 4, §3.3.

pursuant to this Agreement: *viz.*, RRC 4, §3.5 and *ibid.*, Sch. 3.

pursuant to the Retrocession Agreement: *viz.*, RRC 5, Sch. 3.

for the benefit of the Names: but each RRC 4 “Name” is subordinated to *ibid.* “General Creditors” (see generally RRC 4, Sch. 3, §12) and “Insurance Creditors” (see RRC 7, §2.7).

- 3.7 It is hereby acknowledged by each of the parties to this Agreement that, other than pursuant to clause 3.11, this Agreement is not intended to and does not create any obligations to, or confer any rights upon, Insurance Creditors or any other persons not parties to the Agreement. It is hereby further acknowledged by each of the parties to this Agreement that this Agreement is not intended to and does not create any third party beneficiary status in, or confer third party beneficiary rights upon, Insurance Creditors or any other persons with respect to this Agreement but without prejudice to the terms of the Declaration of Trust.

NOTE: see similarly RRC 5, §2.6 (and *cf.* incidentally the subsequent, inapplicable Contracts (Rights of Third Parties) Act 1999). Equitas Re asserts that this provision prevents an EquitasRe-assured-at-Lloyd’s suing Equitas Re direct. *Cf.* RRC 4, §4’s express references to “policyholder protection”, RRC 7, §2.7 references to “Insurance Creditors”, etc.

- 3.8 If any overseas government, governmental, quasi-governmental, supranational, statutory or regulatory body seizes or otherwise takes control of the EATF, the ECTF or any Overseas Deposit Fund whether for the purpose of securing obligations to Insurance Creditors or otherwise:

NOTE: see RRC 4, §3.4.

seizes or otherwise takes control of the EATF: see for example EATD, §12(c) and (d); LATD, §§18.3 and 18.4; Lloyd's US Surplus-Lines Common-Use Trust Deed, §§ 4.4 and 4.5; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §§ 4.4 and 4.5.

- (a) the obligation on ERL to pay that proportion of any Claim which would have been paid from the relevant fund shall be suspended for so long as such circumstances apply; and

NOTE: and see in the context of proportionate cover, RRC 4, Sch. 3, §§6.2, 9.

- (b) the Reinsurance Obligation shall be treated as discharged to the extent that cash or assets held in the relevant fund are applied by that government, governmental, quasi-governmental, supranational, statutory or regulatory body toward the settlement of any Claim.

NOTE: provisions for the distribution by NYID of relevant fund assets are in EATD (§12(d)), LATD (§18(4)), Lloyd's US Surplus-Lines Common-Use Trust Deed (§4.5) and Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed (§4.5).

No termination for non-payment or non-disclosure

- 3.9 The Reserve Groups, Lloyd's and ERL have been provided with or been given access to certain materials and information and received representations and responses to certain questions put to the Managing Agent of each Syndicate or any predecessor managing agent of that Syndicate in relation to the Syndicate 1992 and Prior Business of that Syndicate, assets held in respect thereof and non-insurance liabilities of that Syndicate (such materials, information, representations and responses being collectively referred to as the *Disclosure*). ERL shall have no right to avoid this Agreement after the Effective Date by reason of any non-disclosure or misrepresentation (whether or not innocent) notwithstanding that some material facts or matters may not have been or may not be disclosed to ERL, any Reserve Group or Lloyd's and/or that some of the Disclosure may not be accurate or complete, but this shall be without prejudice to any rights of ERL under any Supervisory Management Agreement or any Information and Administration Agreement or the Completion Accounts and Co-operation Agreement.

NOTE: cf. RRC 5, §3.7. On no termination for non-payment of Equitas premium, see RRC 4, §3.10. And see RRC 4, §2(1)(b)(iv). Equitas Re settled its own relevant personal claims in RRC 1. Were Equitas Re to avoid RRC 4, the EquitasRe-reinsured liabilities would presumably simply revert to relevant SYA participants, where they already are in the first place. And cf. PCW Syndicates v PCW Reinsurers [1995] CLC 1517 (CA; avoidance of reinsurance contracts for non-disclosure).

non-insurance liabilities: presumably including eligible expenses such as run-off management fees, professional fees (accountants, auditors, lawyers, etc.).

- 3.10 ERL expressly acknowledges that it shall have no right to terminate this Agreement, in whole or in part, following the Effective Date, as a result of non-payment of any Name's Premium or any other failure of the consideration to be provided to ERL pursuant to clause 5.

NOTE: on no avoidance for misrepresentation or non-disclosure, see RRC 4, §3.9.

non-payment of any Name's Premium: refusnik refusal to pay and the Corporation's failure to execute judgment has no effect on Equitas Re's obligation to perform RRC 4 (and financially the number of actual refusniks appears to be inconsequential to its ability to perform it).

consideration: see RRC 4, §5 and *ibid.*, Sch. 4.

Underwriting decision

- 3.11 It is expressly acknowledged and agreed:

- (a) by ERL and Lloyd's that, although the Managing Agent of each Syndicate was afforded opportunities to discuss the valuation of the relevant Syndicate 1992 and Prior Business as at the Inception Date, the Substitute Agent and the Names have been directed to enter into this Agreement by the Council and that neither the Substitute Agent nor the relevant Managing Agent has any responsibility or liability to ERL or Lloyd's in relation to the acceptance of the terms set out in this Agreement or the basis for such valuation, PROVIDED THAT this acknowledgment of no liability or responsibility shall be without prejudice to the duties and obligations of that Managing Agent or any predecessor managing agent in respect of that Syndicate

under any Supervisory Management Agreement, any Information and Administration Agreement or the Completion Accounts and Co-operation Agreement;

NOTE: see also RRC 4, §3.9.

Lloyd's: suggests self-regulators'-at-Lloyd's recognition that EquitasRe-reinsured liabilities may be presented to the Lloyd's enterprise.

Managing Agent of each Syndicate: infelicitous: in relation to insurance transactions, the managing agency acts for and is retained individually by each individual SYA participant.

opportunities to discuss the valuation: On the Equitas Reserving Project, see p.31.

the Substitute Agent and the Names have been directed to enter into this Agreement by the Council: the compulsory nature of RRC 4 is discussed elsewhere.⁶⁶

- (b) by the Substitute Agent on behalf of each Name that no Managing Agent has any responsibility or liability to that Name in relation to the acceptance of the terms set out in this Agreement or the basis for valuation of the Syndicate 1992 and Prior Business of any Syndicate as at the Inception Date or the amount of his Name's Premium, PROVIDED THAT this acknowledgment of no liability or responsibility shall be without prejudice to the duties and obligations of that Managing Agent or any predecessor managing agent in respect of that Syndicate under any Supervisory Management Agreement, any Information and Administration Agreement or the Completion Accounts and Co-operation Agreement; and

NOTE: this singular provision purports to effect each exculpation by each EquitasRe-reinsured SYA participant of relevant actionable misconduct of his own managing agency before it was replaced by AUA 9. This power of AUA 9 goes beyond current SUA 1 powers. Had it been a legitimate power, it would presumably have been liberally used in pre-R&R disputes. *Cf.* Accepting Names' releases of managing agencies for actionable misconduct at RRC 1, §4.5.

the amount of his Name's Premium: see *SOD*, App. 5, §1.11 (p.3).

Supervisory Management Agreement, any Information and Administration Agreement or the Completion Accounts and Co-operation Agreement: these obsolete agreements largely relate to liability of the Managing Agent to Equitas Re.

- (c) by Lloyd's and by the Substitute Agent on behalf of each Name and each Closed Year Name that neither ERL nor Equitas has any responsibility or liability to that Name or Closed Year Name in relation to the valuation of the Syndicate 1992 and Prior Business of any Syndicate as at the Inception Date or, in respect of a Name, the amount of his Name's Premium.

the amount of his Name's Premium: see *SOD*, App. 5, §1.11 (p.3).

POLICYHOLDER PROTECTION

NOTE: "Policyholder protection" is tendentious: the protection engineered by RRC 4, §4 lies not in ensuring that there are sufficient assets to pay any particular "Claim" but principally in Equitas Policyholders Trustee exercising against Equitas Re various RRC 4, §4-assigned rights of EquitasRe-reinsured SYA participants. *Cf.* RRC 4, §3.7, which expressly excludes the EquitasRe-assured-at-Lloyd's from RRC 4 third party beneficiary status.

Assignment to Trustee

- 4.1 For the purposes of this Agreement, the *Assigned Property* shall mean in respect of any Name or Closed Year Name, except as provided in clause 4.2, all right, title, benefit and interest which that Name or Closed Year Name has or may have against ERL in relation to:

NOTE: RRC 4, §4.1 should be read with RRC 4, §3.4 and §4.2, and RRC 7's use of "Trust Property".

Assigned Property: "Assigned Property" — *cf.* the various rights such as to reinsurance recoveries, additional premium, etc. that the EquitasRe-reinsured SYA participant assigns not to Equitas Policyholders Trustee but to Equitas Re⁶⁷ — does not cover all Equitas Re's beneficially owned assets but such only of the fruits of such of Equitas Re's RRC 4, §4.1 obligations as derive from its beneficially owned assets (*viz.*, those not expressly covered by RRC 4, §4.2) as each individual EquitasRe-reinsured SYA participant happens separately and personally to be entitled to (which presumably involves Equitas Re keeping all appropriate accounts⁶⁸). The RRC 4, §4 assignment also does not extend to the EquitasRe-reinsured SYA participant's rights against Equitas Re in relation to the latter's RRC 4, §9 run-off agency functions. The Assigned Property is assigned in RRC 4 by AUA 9 to Equitas Policyholders Trustee⁶⁹ absolutely by way of first fixed charge.⁷⁰ The assignment divests the assignor EquitasRe-reinsured

⁶⁶ See for example p.A30.

⁶⁷ See RRC 4, §§6.1 and 6.4.

⁶⁸ On which see RRC 4, §15.3.

⁶⁹ RRC 4, §4.3. On "Assigned Property", see *ibid.*, §4.1.

⁷⁰ RRC 4, §4.3.

SYA participant of all expectation of direct recovery of any money from Equitas Re, whether in the form of damages or otherwise. “Assigned Property” does not include assets of the EATD, ECTD, or any Overseas Deposit Deed,⁷¹ which are already in effect secured for relevant EquitasRe-assureds-at-Lloyd’s. The continuing securitisation is acknowledged by Equitas Re.⁷² Equitas Policyholders Trustee undertakes to re-assign relevant Assigned Property to each assignor in circumstances prescribed in RRC 7,⁷³ viz., when Equitas Policyholders Trustee receives such notice as in its absolute direction it requires that the “Secured Obligations” (as defined) have been paid and discharged in full and that all sums which are or may become payable to it under RRC 7 have been “satisfied” in full.⁷⁴ That property includes all right, title, benefit and interest that the EquitasRe-reinsured SYA participant may have against Equitas Re in relation to: (1) obtaining return premium;⁷⁵ (2) Equitas Re discharging its RRC 4, §3.1 *et seq.* “Reinsurance Obligation”⁷⁶ including (for example) the EquitasRe-reinsured SYA participant’s right to recover damages from Equitas Re for breach of that obligation and his relevant rights in relation to that obligation arising in relevant insolvency proceedings.⁷⁷

Closed Year Names: error: Equitas Re has no liability whatever to any Closed Year Name: see the annotation to RRC 4, Sch. 2, §1 definition of “Closed Year Name”, and RRC 4, §3.3.

against ERL: *cf.* the EquitasRe-reinsured SYA participant’s claim against another party: see for example RRC 1, Sch. 1, definition of “Equitas Claim”.

(a) the performance of the Reinsurance Obligation by ERL, including, without limitation:

performance of the Reinsurance Obligation: *viz.*, RRC 4, §3.2 cash to be paid, in the manner provided in *ibid.*, §3.4, by Equitas Re to a particular EquitasRe-assured-at-Lloyd’s (quantifying this SYA-participant-specific obligation appears to depend on Equitas Re keeping detailed accounts by each relevant EquitasRe-reinsured SYA participant, on which see RRC 4, §15.3(b)). RRC 4, §4.1(a) is insistent that its assignment Equitas Re’s *ibid.*, §3 obligations: *cf.* Equitas Re’s RRC 4, §9 run-off agency obligations, in respect of which Equitas Re indemnifies (at *ibid.*, §10.2) the EquitasRe-reinsured SYA participant similarly to *ibid.*, §3.2 but in relation to which Equitas Policyholders Trustee is not an express RRC 4 assignee.

(i) any right to receive damages for breach of the Reinsurance Obligation; and

to receive damages: cash to be paid by Equitas Re personally out of its beneficially owned assets to an EquitasRe-reinsured SYA participant — *cf.*, for example, exemplary and punitive damages to be paid to an EquitasRe-assured-at-Lloyd’s by an EquitasRe-reinsured SYA participant, on which see for example Lloyd’s US Surplus-Lines Common-Use Trust Deed, 1.3(i); Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §1.3(i).

of the Reinsurance Obligation: *cf.* damages for breach of RRC 4, §9 run-off agency obligations, which are an entirely different matter: see *ibid.*, §10.1 *et seq.*

(ii) any rights in relation to the Reinsurance Obligation in a winding-up of ERL or pursuant to any scheme or composition entered into between ERL and its creditors including any scheme of arrangement or compromise made under section 425 of the Companies Act 1985 and any voluntary arrangement made between ERL and its creditors under sections 1 to 8 of the Insolvency Act 1986; and

scheme of arrangement or compromise: see p.233.

section 425 of the Companies Act 1985: see p.233.

voluntary arrangement: see p.229.

sections 1 to 8 of the Insolvency Act 1986: see p.229.

(b) any return of premium payable on a winding-up or pursuant to any scheme or composition entered into between ERL and its creditors to the extent that the Secured Obligations have not been satisfied in full.

return of premium: see RRC 4, §8 and *ibid.*, Sch. 5. Quantifying this obligation depends on Equitas Re keeping detailed accounts by EquitasRe-reinsured SYA participant, on which see RRC 4, §15(3)(b).

to the extent that the Secured Obligations have not been satisfied in full: to that extent, RRC 4, §4.1(b) automatically interposes Equitas Policyholders Trustee, to which extent it is unnecessary to consider the EquitasRe-reinsured SYA participant’s relevant rights in Equitas Re’s liquidation.

⁷¹ RRC 4, §4.2.

⁷² RRC 4, §4.5.

⁷³ RRC 4, §4.4.

⁷⁴ RRC 7, §2.13.

⁷⁵ RRC 4, §4.1(b).

⁷⁶ See the detailed provisions at RRC 4, §4.1. See also *ibid.*, Sch. 2, §1, definition of “Secured Obligations”.

⁷⁷ RRC 4, §4.1(a)(ii).

- 4.2 The Assigned Property shall not include any cash, assets or other rights to the extent held subject to the trust of the EATD, the ECTD or any Overseas Deposit Deed for the benefit, directly or indirectly, of the Insurance Creditors.

NOTE: the provision is appropriate: such assets are not free assets belonging beneficially to Equitas Re. And see RRC 4, §3.4.

trust: error for “trusts”.

EATD: see especially EATD, §4(b) (LATD Trustee under no EATD obligation to pay a LATD liability at less than 100% just because Equitas Re or Equitas Ltd. is insolvent).

Overseas Deposit Deed: see RRC 4, §§3.4(c), 3.8.

- 4.3 In consideration of an assignment in the same terms by all other Names and Closed Year Names, the Substitute Agent on behalf of each Name and each Closed Year Name hereby assigns the Assigned Property absolutely by way of first fixed mortgage to the Trustee, with effect from the Effective Date, such assignment on behalf of each Name and each Closed Year Name being an assignment of the Assigned Property as security for the discharge and payment of all obligations of all Names and all Closed Year Names under all contracts of insurance which have been reinsured pursuant to the Equitas Scheme.

NOTE: this should be read with RRC 4, §§4.5, 4.8 and 4.9. On re-assignment, see *ibid.*, §4.4.

on behalf of: *viz.*, merely as agent of.

hereby assigns the Assigned Property absolutely by way of first fixed mortgage to the Trustee: see generally RRC 7, recital (B), *ibid.*, §1.1 definition of “Trust Property”, and *ibid.*, §2 *et seq.* Once the relevant liabilities have been discharged, the mortgage can be redeemed and relevant surplus assets liberated to relevant EquitasRe-reinsured SYA participants per RRC 7, §2.7(d).

Closed Year Name: error: since Equitas Re has no liability whatever to any Closed Year Name ordinarily (*cf.* in the circumstances envisaged in RRC 4, §3.3), there is nothing to assign under RRC 4, §4.1(a). As to *ibid.*, §4.1(b), presumably a Closed Year Name will have paid no relevant EquitasRe-reinsurance premium in the first place.

- 4.4 The Trustee undertakes to reassign to each Name and Closed Year Name the relevant Assigned Property in the circumstances set out in clause 2.13 of the Declaration of Trust.

NOTE: see RRC 7, §2.13.

Closed Year Name: error: see RRC 4, §4.3, annotation to “Closed Year Name”.

Acknowledgment of Assignment

- 4.5 ERL hereby acknowledges the assignment contained in clause 4.3 and the Trustee hereby directs ERL to pay amounts agreed or lawfully due and payable in respect of any Claim as provided in clause 3.4 but subject to clause 4.10.

Declaration of trust

- 4.6 The Trustee hereby agrees that it will, on the date hereof, enter into the Declaration of Trust in the form set out in Appendix 1. The Trustee shall hold the Assigned Property on the terms set out in the Declaration of Trust. Each party to this Agreement shall be bound by the terms of Declaration of Trust and to the extent that they are stated to have any obligation pursuant to the terms thereof hereby expressly agree to be bound by such obligation.

Appendix I: see this Edition, Appendix 1.4.

on the terms set out in the Declaration of Trust: see RRC 7, §2.1 *et seq.*

to the extent that they are stated to have any obligation: RRC 4 parties who do have RRC 7 obligations include Equitas Re and Equitas Policyholders Trustee.

- 4.7 ERL and Equitas each hereby covenants with the Trustee that, so long as any of the Secured Obligations remains outstanding, it will at all times give to the Trustee such information in its possession or under its control as the Trustee may reasonably require for the purpose of the discharge of the trusts, powers, rights, duties, authorities and discretions vested in the Trustee hereunder or under the Declaration of Trust or by operation of law.

NOTE: RRC 7 relevant occurrences of “information” include at *ibid.*, §§2.6, 2.10. Equitas Policyholders Trustee is empowered to proceed or not without inquiry: see for example *ibid.*, §§2.2(b), 2.4, 2.9 and 6.1. Obtaining all possible relevant information will presumably not be an issue in practice since Equitas Re, Equitas Ltd. and (the present Trustee) Equitas Policyholders Trustee are in common ownership.

- 4.8 The Substitute Agent hereby covenants with the Trustee that so long as any of the Secured Obligations remains outstanding and for so long as the Substitute Agent retains authority pursuant to the Substitute Agent’s Appointment, it will execute and do all such assurances, acts, deeds and things as

the Trustee may reasonably require for protecting or perfecting the security over the Assigned Property and the exercise of all powers, authorities and discretions vested in it and shall in particular execute all transfers, conveyances, assignments, assurances and registrations of the Assigned Property whether to the Trustee or its nominees or purchasers and give all notices, orders and discretions which the Trustee may think necessary or expedient.

NOTE: see RRC 4, §4.3.

- 4.9 The security created hereunder and pursuant to the Declaration of Trust shall be held by the Trustee as a continuing security for the payment in full of the Secured Obligations notwithstanding any settlement of account or any other act, event or matter whatsoever.

NOTE: Equitas Re's mere discharge in part of its RRC 4, §3 obligation does not partly discharge the *ibid.*, §4.3 security.

Payment to Trustee

NOTE: *cf.* Equitas Policyholders Trustee's RRC 7, §§2.2 and 2.3 acquisition of Equitas Re money, and its *ibid.*, §2.4 appropriation of Equitas Re Trust Property.

- 4.10 Following any Insolvency Event, the Trustee may by notice to ERL require that all payments which ERL is to make or procure be made pursuant to clause 3.4(d) and 3.4(e) should instead be made directly to it. Such payment shall be treated as discharging in part or in whole the Reinsurance Obligation in the same way as if it had been paid in accordance with clause 3.4(d) or clause 3.4(e). The Trustee shall have absolute discretion as to whether to serve such notice and shall incur no liability to Insurance Creditors or Names or any other person as a result of its exercise or non-exercise of the power to serve such notice.

NOTE: this should be read with RRC 4, §§3.4 and 4.5, and with RRC 7, §§2.4 and 2.15. RRC 4, §4.10 empowers Equitas Policyholders Trustee to seize Equitas Re's putative pay-out to a particular Insurance Creditor. It must pay out that money not to Equitas Re's intended payee but in accordance with RRC 7, §2, especially *ibid.*, §§2.5 and 2.7.

Following: *cf.* RRC 7, §2.4 "Upon".

any Insolvency Event: this should be read with RRC 7, §2.15 and *ibid.*, §2.4 *et seq.*

may: Equitas Policyholders Trustee is empowered to elect only in relation to payment under *ibid.*, §3.4(d) and or (e) and only "upon the occurrence" of a RRC 7, §1.1-defined "Insolvency Event".

payments which ERL is to make or procure be made: being part of the Equitas group, Equitas Policyholders Trustee would presumably know this.

clause 3.4(d) and 3.4(e): Equitas Policyholders Trustee's powers of seizure rightly cannot be exercised against funds already subject to relevant trusts or other relevant instruments, *viz.*, those mentioned at RRC 4, §3.4(a)-(c) (and in relation to which RRC 4, Sch. 3 specially provides: see for example *ibid.*, §6.1(b)-(d)).

should instead be made directly to it: *viz.*, instead of to the particular Insurance Creditor for whom Equitas Re intended to pay it before Equitas Policyholders Trustee appropriated it by a RRC 4, §4.10 notice.

Such payment shall be treated as discharging in part or in whole the Reinsurance Obligation in the same way as if it had been paid in accordance with clause 3.4(d) or clause 3.4(e): *viz.*, so treated only as between Equitas Re and the relevant EquitasRe-reinsured SYA participant (notwithstanding RRC 4, §9.4(c) in relation only to the particular RRC 4, §3.1 Reinsurance Obligation in issue. The payment does not discharge any insurance contract sold by any EquitasRe-reinsured SYA participant, and has nothing otherwise to do with any EquitasRe-assured-at-Lloyd's. The latter, the putative payee Insurance Creditor, loses the RRC 4, §4.10-appropriated sum as such, and receives only what Equitas Policyholders Trustee happens to pay him under RRC 7, §2.7(b).

absolute discretion as to whether to serve such notice: see similarly RRC 7, §5(c) etc. On Equitas Policyholders Trustee's exercise of its RRC 4, §4.10 powers, see RRC 7, §2.4. Equitas Policyholders Trustee's failure to serve a RRC 4, §4.10 notice does not amount to a waiver of relevant rights: RRC 7, §13.

no liability to Insurance Creditors: see also RRC 4, §3.7.

...

ADDITIONAL CONSIDERATION

Syndicate Reinsurances, Financial Reinsurances and Other Returns

NOTE: should be read with RRC 4, §5.1(c).

- 6.1 Subject to clause 6.3 and to clause 6.13, each Name and each Closed Year Name, acting through the Substitute Agent, hereby assigns and agrees to assign to the Managing Agent's Trustees of the Name's or the Closed Year Name's relevant Premiums Trust Deed, with effect as and from the Effective Date, all of the right, title and interest of the Name or the Closed Year Name in the Other Returns and in the proceeds and the right to receive proceeds (whether or not accrued) of all Syndi-

cate Reinsurances, other than Financial Reinsurances and Orion/L&O Reinsurances, and including the benefit of any Security Interest for, or other obligation of any third party in relation to, the performance of any Syndicate Reinsurance or Other Return, whether or not the Name or Closed Year Name has a present entitlement to the Other Returns or the proceeds of the Syndicate Reinsurances, as the case may be, to be held on the terms of such Premium Trust Deed.

NOTE: RRC 4, §6.1(various assignments by the EquitasRe-reinsured SYA participant to Equitas Re; *cf. ibid.*, §4.1 (various assignments by the EquitasRe-reinsured SYA participant to Equitas Policyholders Trustee)) should be especially read with *ibid.*, §§6.4 and 6.5, which explain how Equitas Re comes to have an interest in each relevant EquitasRe-reinsured SYA participant's outward reinsurance recoveries. Equitas Re in turns assigns RRC 4, §6.1 assigned property to Equitas Ltd. (see RRC 5, §3.2). Refuseniks (inconsequential to any EquitasRe-assured-at-Lloyd's) have contended that they assigned nothing to Equitas Re.⁷⁸ The RRC 4, §§6.1 and 6.4 outward reinsurance assignments form part of the *ibid.*, §3 consideration: see *ibid.*, §3.1(c). Equitas Re is entitled to net off outward reinsurance recoveries (*ibid.*, §3.2(a)) but bears personally the risk of failing to achieve any such recovery (*ibid.*, §3.2).

the Name's ... relevant Premiums Trust Deed: Insurance Companies Act 1982, s.83(2) required, and FSA Lloyd's Rulebook, §10.3.1 in effect requires, a SYA participant to hold all premium income in a trust fund. The RRC 4, §§6.1 and 6.4 mechanism whereby outward reinsurance rights come into Equitas Re's hands takes into account that the SYA participant is unable to beneficially hold relevant accretions to his insurance business: all such accretions accrue to his PTF.⁷⁹ The EquitasRe-reinsured SYA participant assigns outward reinsurance accretions to his PTF trustees who in turn assign them in RRC 4, §6.4 to Equitas Re: see RRC 4, §6.4.

the Closed Year Name's relevant Premiums Trust Deed: since he is already conventionally outwardly-RTCd, the Closed Year Name will by definition have no relevant outward reinsurance recoveries. To the extent that the Closed Year Name is also no longer an underwriting Member, he will have no premium trust funds.

all Syndicate Reinsurances: *viz.*, each EquitasRe-reinsured SYA participants' outward reinsurance cover.⁸⁰

Premium: error for "Premiums".

- 6.2 References in this clause 6 to the "relevant Premiums Trust Deed" are to the Premiums Trust Deed of the relevant Name or Closed Year Name to which the proceeds of the rights in question would, but for this Agreement, have been subject.

of the relevant Name: like the LATD, the PTD is a personal-use deed.

- 6.3 The assignment contained in clause 6.1 does not extend to Other Returns or to Syndicate Reinsurances to the extent that amounts payable or paid under or in respect of those Other Returns or Syndicate Reinsurances, as the case may be, would constitute assets of the Name's or the Closed Year Name's LATF or LCTF.

- 6.4 Subject to clause 6.13, the Managing Agent's Trustees shall on or after the Effective Date, when directed to do so pursuant to the relevant Premiums Trust Deed by the Substitute Agent acting as Managing Agent of each Name and Closed Year Name, assign to ERL the rights assigned to it under clause 6.1 in accordance with the terms of the relevant Premiums Trust Deed, so as to transfer the benefit of the Other Returns or of the Syndicate Reinsurances (other than Financial Reinsurances and Orion/L&O Reinsurances) to ERL or as ERL shall direct in partial satisfaction of the consideration for the assumption of the Reinsurance Obligation by ERL. For the avoidance of doubt, any funds received by the Name or Closed Year Name or the Managing Agent's Trustees, or by any person on behalf of any of them, in respect of any rights assigned to the Managing Agent's Trustees pursuant to clause 6.1, but not assigned or otherwise transferred by the Managing Agent's Trustees pursuant to this clause 6.4, shall be subject to the provisions of clause 6.12 below as if the Name or Closed Year Name had been under an obligation to assign the rights to ERL. The Substitute Agent undertakes to ERL to give the directions contemplated by this clause 6.4 on the Effective Date.

NOTE: this should be especially read in conjunction with RRC 4, §§3.2(a) and 6.1; and see EATD, recital [9]. Equitas Re as claimant on outward reinsurance is discussed elsewhere.⁸¹ Subject to the construction placed on the assignment — it has been judicially⁸² characterised (*obiter*) as an equitable assignment — Equitas Re becomes the outward reinsurer's creditor. If the latter

⁷⁸ See for example *Avon Insurance Plc v Swire Fraser Ltd.* [2000] Lloyd's Rep IR 535, 542 (Rix J), on the basis of which contention they were separately represented in the case: *ibid.*

⁷⁹ See for example *Lloyd's v Robinson* [1999] 1 WLR 756 (HL); *Lloyd's v Morris* [1993] 2 Re.L.R. 217 (CA).

⁸⁰ On interests under insurance contracts being choses in action, see *Re Moore* (1878) 8 Ch.D. 519 (CA). On legal assignment of choses in action, see Law of Property Act 1925, s.136; of interests arising under marine insurance contracts, see Marine Insurance Act 1906, s.50.

⁸¹ See p.88.

⁸² *Baker v Black Sea & Baltic General Reinsurance Co. Ltd.* [1998] 1 WLR 974, 978 (Lord Lloyd; italics added):-

becomes insolvent, it can exercise (as assignee) one vote at the creditors' meeting rather than (as RRC 4, §9 run-off agent) as many votes as there are relevant EquitasRe-reinsured SYA participants.⁸³

the Substitute Agent acting as Managing Agent of each Name: viz., acting under a standard or not-standard form of agency agreement.

the Substitute Agent acting as Managing Agent of each ... Closed Year Name: error: no Closed Year Name has or can have any relevant managing agency.

- 6.5 Subject to clause 6.13, each of the Names and the Closed Year Names, acting through the Substitute Agent, hereby assigns and agrees to assign to ERL, with effect as and from the Effective Date, all the right, title and interest of the Name or the Closed Year Name, to the extent not already assigned pursuant to clause 6.1, in the Other Returns and in proceeds and the right to receive proceeds (whether or not accrued) of all Syndicate Reinsurances, other than Financial Reinsurances and Orion/L&O Reinsurances, whether or not the Name or Closed Year Name has a present entitlement to the Other Returns or the proceeds of the Syndicate Reinsurances, as the case may be.

NOTE: see similarly RRC 4, §6.1. The *ibid.*, §§6.5 outward reinsurance assignment forms part of the *ibid.*, §3 consideration: see *ibid.*, §3.1(c). This catches outward SYA-level reinsurance recoveries (*cf.* SYA-participant-level PSLI recoveries) which might not have been captured by the PTF.

- 6.6 Each of the Names and the Closed Year Names, acting through the Substitute Agent, and the Substitute Agent covenant that the Substitute Agent on behalf of each Name and each Closed Year Name and on its own behalf or as managing agent of any Name or Closed Year Name will take all action from time to time directed by ERL to ensure that the benefit of the Financial Reinsurances and of the Orion/L&O Reinsurances of each Syndicate and Closed Year Syndicate, including without limitation, rights to rebate or return of premium thereunder, and any credit support, Security Interest or other rights granted in connection therewith (for the purposes of this clause 6 referred to together as the *Relevant Rights*) are transferred to and will enure to the benefit of ERL or such other person as ERL may direct.

NOTE: see EATD, recitals [9] and [10].

acting through the Substitute Agent: it is not feasible (even if in accord with the SYA-level passivity rule), for any EquitasRe-reinsured SYA participant to be directly involved in such matters. The terms of AUA 9's appointment enable comprehensive representation. AUA 9 has a general contractual duty to cooperate with Equitas Re: see *ibid.*, §14.1 (obligation to ratify things done by Equitas Re or any delegate or sub-delegate) and *ibid.*, §14.2 (AUA 9's undertaking to exercise any power of attorney in order to execute documents where necessary or expedient etc.).

from time to time directed by ERL: see RRC 4 §6.7. RRC 4 empowers Equitas Re to give directions in relation to certain matters (see *ibid.*, §§6.6, 6.7), such directions to be communicated to and executed by AUA 9, which need never tell the SYA participant about it: see *ibid.*, §6.9.

- 6.7 The actions which ERL may direct be taken by a Name or a Closed Year Name or the Substitute Agent pursuant to clause 6.6 include, without limitation:
- (a) assigning any of the Relevant Rights to the Managing Agent's Trustees of the relevant Premiums Trust Deed to be held on the terms of such Premiums Trust Deed and taking steps to perfect such assignment;

[A] company called Equitas Reinsurance Ltd. took over the rights and liabilities of all members in respect of the 1992 year of account and prior years Equitas [Re] now has the responsibility, as *equitable* assignee, of pursuing claims and by members against their reinsurers

For a recent judicial summary of three types of assignment, see for example *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825, 849-850 (Mance LJ), viz., of a marine insurance policy by endorsement or other customary manner (Marine Insurance Act 1906, s.50(2)); an absolute assignment of any debt or other legal thing in action in writing by the assignor, notice being given to the debtor (Law of Property Act 1925, s.136(1); legal assignment), and assignment short of the latter (*equitable* assignment).

⁸³ But see for example Sovereign Marine & General Insurance Company Limited, October 15, 1999 scheme of arrangement proposal, §6.7 (p.34):-

Equitas has taken the position that the Names retain the right to vote at the Creditors' Meeting. However, as a compromise, Equitas has proposed that at the Creditors' Meeting each numbered Lloyd's syndicate which has Scheme Claims be allocated one vote in number and the value allocated to that vote be the value of its Scheme Claims (subject to the chairman's overriding discretion where the value of Scheme Claims has been estimated). ... The Provisional Liquidators are aware that this method of voting has been adopted in a number of other schemes of arrangement which have been voted upon, approved by creditors and sanctioned by the Court both before and after the assignments had taken place. After careful consideration, the Joint Provisional Liquidators have accepted the proposal of Equitas and have obtained a direction from the Court that for the purposes of the Creditors' Meeting each Lloyd's syndicate ... which is a Scheme Creditor shall be entitled to one vote in number.

- (b) assigning to ERL, or as ERL may direct, any of the Relevant Rights or the right to receive proceeds in respect of any of the Relevant Rights and taking steps to perfect such assignment;
- (c) entering into a contract pursuant to which the Name or the Closed Year Name agrees to the discharge of his rights in respect of any of the Relevant Rights in consideration of corresponding or similar rights being granted to ERL or such other person as ERL may direct;
- (d) entering into a contract varying in any manner the rights of the Name or the Closed Year Name in respect of any of the Relevant Rights;
- (e) exercising any rights conferred on the Name or the Closed Year Name (alone, or jointly with other members of the relevant Syndicate or Closed Year Syndicate) pursuant to, or as the person entitled to, any of the Relevant Rights in such manner as ERL may from time to time direct; and
- (f) declaring a trust, in such terms as may be directed, over any of the rights of the Name or the Closed Year Name in respect of any of the Relevant Rights.

6.8 A direction under clause 6.6 may be given to Names or Closed Year Names generally, by reference to any class or by reference to membership of a Syndicate or of a Closed Year Syndicate, and may be given in relation to particular rights in respect of Relevant Rights or such rights by reference to a description or class. For the avoidance of doubt, a direction may be given under clause 6.6 in respect of Relevant Rights even if a direction has already been given in respect of those rights.

6.9 Any direction under clause 6.6 may be given by ERL to any Name or Closed Year Name by being given to the Substitute Agent on his behalf. The Substitute Agent shall be under no duty to communicate such directions to the Names and Closed Year Names, provided that it takes all actions required by the direction on behalf of the Names and the Closed Year Names to whom the direction is made.

no duty to communicate such directions to the Names: consistent with SYA-level passivity rule.⁸⁴

6.10 A direction under clause 6.6 may require documents to be executed prior to the Effective Date, provided that under the terms of such documents the transfer to be effected of the benefit of Relevant Rights does not take effect until the Effective Date or some later time.

6.11 Without limiting the effect of any other provision of this clause 6, the benefit of Syndicate Reinsurances (including, without limitation, the Financial Reinsurances) and of the Other Returns will enure to the benefit of ERL, as reinsurer to close of the aggregate ultimate net liability of each Syndicate or Closed Year Syndicate in respect of that Syndicate or Closed Year Syndicate's 1992 and Prior Business.

as reinsurer to close: see RRC 4, recital (F). This provision undermines the otherwise neat theory that the RRC 4, §3 product is definitely not RTC but reinsurance. But "Closed Year Syndicate" is (also) misconceived.

6.12 Each Name and each Closed Year Name agrees, subject to clause 6.3, that, if, on or after the Effective Date, he receives any funds in respect of Other Returns, Syndicate Reinsurances or any Relevant Rights of which the Name or the Closed Year Name is, as at the date hereof, the legal owner or has or may in the future acquire any other rights (whether because the right to receive such funds has not been effectively assigned or transferred to ERL or otherwise), or if such funds are received by the trustees of the Name's or the Closed Year Name's Premiums Trust Funds, LATF or LCTF, the Name or Closed Year Name will pay to ERL an amount equal to the funds so received, which shall, to that extent, constitute due performance of the obligation to transfer the rights in satisfaction of which the payment was made, PROVIDED THAT the amount payable by the Name or the Closed Year Name under this clause 6.12 shall be limited to such amount in respect thereof as can properly be paid from the funds then or at any later time standing to the credit of the Name's or the Closed Year Name's Premiums Trust Funds, LATF or LCTF.

6.13 In respect of any Syndicate Reinsurances under which liabilities other than 1992 and Prior Business are reinsured, clause 6.1 shall only have effect, and shall be construed as being limited to, rights un-

⁸⁴ See p.180.

der or in respect of those Syndicate Reinsurances (and including the benefit of any Security Interest for, or other obligation of any third party in relation to, the performance of any Syndicate Reinsurance) insofar as they relate to 1992 and Prior Business, provided that nothing in this clause 6.13 requires express reference to this limitation in an instrument required to be executed pursuant to clause 6.7.

6.14 ERL is authorised to give notice of any assignment under this clause 6 to any person affected thereby and to the extent that the relevant rights or interests:

- (a) are not capable of assignment;
- (b) have not been assigned; or
- (c) have been assigned to ERL pursuant to a request under this clause 6 but that assignment is not recognised by any relevant court or body,

ERL is irrevocably authorised to collect the same for its own account (but subject to the obligations in clause 6.17) whether in its own name or that of the relevant Names and/or Closed Year Names and to that end ERL shall be entitled to exercise all such powers as may be necessary or expedient in connection therewith.

...

PART II — RUN-OFF OF THE REINSURED ACCOUNTS

RUN-OFF FROM THE EFFECTIVE DATE

9.1 In consideration of the Names and Closed Year Names, acting through the Substitute Agent, entering into the reinsurance agreement contained in Part I of this Agreement, ERL shall be entitled to assume, and undertakes and agrees to assume, responsibility for, and the Names and Closed Year Names irrevocably appoint ERL to perform, the Run-off in accordance with the provisions of this Part II of this Agreement and subject to and in accordance with the provisions of the EATD, the ECTD and any Overseas Trust Deeds.

NOTE: Equitas Re is enabled to perform its RRC 4, §9 obligations by its memorandum and articles of association; it decided that it would do so by its own board resolution.⁸⁵

the Names irrevocably appoint: cf. RRC 4, §11.1 (transitional appointment of Equitas Re by AUA 9).

irrevocably appoint ERL to perform, the Run-off: cf. RRC 4, §9.4 (“irrevocable and exclusive power to manage each Run-off”). In RRC 4, §§9.1 and 9.2, each EquitasRe-reinsured SYA participant appoints Equitas Re as his run-off agent in relation to each of his EquitasRe-reinsured liabilities. That role is separate from and not to be (though it has been⁸⁶) confused with Equitas Re’s separate RRC 4, §3 role as a reinsurance company. Only the subjectmatter is common to both roles.

ERL: the EquitasRe-reinsured SYA participant is not permitted (even if equipped) run off his own EquitasRe-reinsured liabilities or procure some other agent to do so. Equitas Re for its part is permitted to delegate, and does so: see RRC 4, §

acting through the Substitute Agent: this relates to the Names entering into RRC 4, Part I, not the Names appointing Equitas Re under *ibid.*, §9.1.

the Names ... appoint ERL to perform ... the Run-off: each EquitasRe-reinsured SYA participant personally and directly contracts with Equitas Re as his own personal and direct run-off agent, in contrast to other⁸⁷ RRC 4 provisions where AUA 9 acts on his behalf.

Closed Year Names: error: a Closed Year Name by definition has no liabilities capable of being run off. Presumably this reference to Closed Year Names is the run-off agency equivalent of RRC 4, §3.3 (reinsurance of a Closed Year Name). And see the annotation to RRC 4, §3.3.

irrevocably: and see RRC 4, §9.2 (“irrevocable”) (and also incidentally references to irrevocability at *ibid.*, §§6.14, 9.4, 25.1). Generally foreign⁸⁸ to English commercial law, irrevocable agency has been judicially upheld in the context of the Lloyd’s en-

⁸⁵ See generally RRC 4, recital (E).

⁸⁶ See p.45.

⁸⁷ Especially for example RRC 4, §11.1, where AUA 9 appoints Equitas Re as AUA 9’s run-off sub-agent for a transitional period.

⁸⁸ See for example *AA Mutual Insurance Co. Ltd. v Bradstock Blunt & Crawley Ltd.* [1996] LRLR 161, 164 (Hobhouse J; reinsurance company; “What is, in effect, the submission of the defendants is that there is some open-ended authorization which has to be on immutable terms. That is not an acceptable proposition”).

terprise.⁸⁹ specifically and peculiarly in the context of SYA participation. Identical dynamics apply to the relationship between each EquitasRe-reinsured SYA participant and Equitas Re as RRC 4, §9 run-off agent.⁹⁰

Powers of ERL

- 9.2 With effect from the time and date on which the last condition in clause 2.1 is satisfied, and subject to and in accordance with the provisions of the EATD, the ECTD and any Overseas Trust Deeds, ERL will assume exclusive and irrevocable responsibility for the Run-off of the Syndicate 1992 and Prior Business of each Syndicate and each Closed Year Syndicate. ERL shall be entitled and obliged from the time and date on which the last condition in clause 2.1 is satisfied to conduct the Run-off of the Syndicate 1992 and Prior Business of each Syndicate and each Closed Year Syndicate as agent of the Names and Closed Year Names in its absolute discretion without prejudice to the powers of the Substitute Agent under any Premiums Trust Deed, the LATD or the LCTD or otherwise in relation to the discharge of any consideration due under clause 3.1, and, without prejudice to the generality of the foregoing, ERL shall be entitled, in accordance with, and subject to, all applicable laws, to exercise the following powers together with all such other powers as may be necessary or expedient in relation thereto:

the last condition in clause 2.1 is satisfied: all RRC 4, §2.1 conditions have been satisfied.

exclusive ... responsibility: Equitas Re's RRC 4, §9 run-off agency functions are substantially identical to a managing agency's run-off functions under (for example) SUA 1 / SCA 1, §5. Every coverage action in modern times to which a SYA participant as such has been a party is likely to have been brought or defended by a managing agency similarly so empowered. These extensive run-off agency functions — *cf.* Equitas Re's RRC 4, §3 reinsurance-principal functions — impose no liability whatever on Equitas Re to fund any claim personally, which in any event would be contrary to the course of business ordinarily at Lloyd's and the availability of relevant personal-use and common-use claims payment securitisation funds at the Lloyd's enterprise: liability to fund a claim ordinarily remains with the EquitasRe-reinsured SYA participant as a conduit to those funds. Exclusive responsibility is not the same as exclusive power, on which see RRC 4, §9.4.

irrevocable: see RRC 4, §9.1, annotation to "irrevocably".

responsibility: "authority" in version FW960630.015/58+.

for the Run-off: *viz.*, managerial, clerical, administrative and similar tasks associated with handling claims on EquitasRe-reinsured SYA participants, identical in principle to run-off conventionally at Lloyd's: see the list at RRC 4, §9.2(a)-(t). The list is comprehensive because of the SYA-level passivity rule⁹¹ (preventing the SYA participant from conducting any aspect of his own insurance business). Performing a run-off — there is a not inconsiderable community of run-off agents operating in the London insurance market — is not equivalent to being a reinsurer.

Closed Year Syndicate: error: see RRC 4, Sch. 2, §1 definition of "Closed Year Syndicate".

as agent: whereas its Articles of Association implicitly empower Equitas Re as RRC 4, §3 reinsurer to handle claims on itself, *ibid.*, §9 expressly empowers Equitas Re to handle claims by EquitasRe-assureds-at-Lloyd's against EquitasRe-reinsured SYA participants. The two functions, though they relate to substantially the same liabilities, are materially different in nature.

Closed Year Names: error: see annotation to RRC 4, §3.3.

- (a) power to adjust, handle, agree, settle, pay, compromise or repudiate any Claim, return premium, reinsurance premium or any other insurance or reinsurance liability on behalf of the Syndicate or Closed Year Syndicate;

NOTE: this provision forms the basis on which the EquitasRe-assured-at-Lloyd's (whether personally or through his Lloyd's broker) treats directly with Equitas Re rather than with any EquitasRe-reinsured SYA participant (who invariably will be wholly unaware of his relevant insurance liabilities).

pay: *viz.*, merely effect the transmission of payment, not fund payment from its own personal funds. Funding payment is a matter for each liable EquitasRe-reinsured SYA participant. On Equitas Re's contractual obligation as mere reinsurer to pay it, see the entirely different use of "pay" in an entirely different context at RRC 4, §3.2, and "payment" at *ibid.*, §3.1.

- (b) power to adjust, handle, agree, settle, pay, compromise or repudiate any other liability, outgoing or expense of the Syndicate or Closed Year Syndicate of whatever nature and wherever arising without limitation in time and amount;

Closed Year Syndicate: error: see annotation to RRC 4, §3.3.

⁸⁹ *Lloyd v Leighs* {1b & 2b} [1997] CLC 1398, 1405 (CA). And see at first instance *Lloyd v Leighs* {1a} [1997] CLC 759, 771-774 (Colman J). *Ibid.*, 774: "[T]he irrevocability of the agent's authority is manifestly essential". See similarly *Daly v Lime Street Underwriting Agencies Ltd.* [1987] 2 FTLR 277 (Staughton J). But see F. P. M. Reynolds, *When is an Agent's Authority Irrevocable?* in *Making Commercial Law, Essays in Honour of Roy Goode* (Clarendon Press, 1997), p.259, p.272-273.

⁹⁰ See p.51.

⁹¹ See p.180.

- (c) power to agree to any variation or extension of existing contracts of insurance or reinsurance entered into by or on behalf of the Syndicate or Closed Year Syndicate and to set any additional premium payable by the insured or reinsured unless already fixed under the terms of the original insurance or reinsurance;

Closed Year Syndicate: error: see annotation to RRC 4, §3.3.

- (d) power to commence, conduct, pursue, prosecute, settle, appeal or compromise any Legal Proceedings on behalf of the Syndicate or Closed Year Syndicate or any Name or to defend any such proceedings taken out against the Syndicate or Closed Year Syndicate or any Name or Closed Year Name in which any outcome will by virtue of this Agreement be for the account of ERL including the provision of any security in respect of any such proceedings;

Closed Year Name: error: see annotation to RRC 4, §3.3.

in which any outcome will by virtue of this Agreement be for the account of ERL: see RRC 4, §3.2.

- (e) power to agree, take down and collect premiums, claim refunds, salvages and reinsurance recoveries;
- (f) power to agree to, or exercise any right to, set off any claims against reinsurance recoveries or vice versa, or to settle any balance of account to any time owing to or from the Syndicate or Closed Year Syndicate or any Name or Closed Year Name in relation to the Syndicate 1992 and Prior Business, whether in respect of claims, premiums, reinsurance, insurance or any other amounts whatsoever;

NOTE: set-off is discussed elsewhere.⁹²

Closed Year Syndicate: error: see annotation to RRC 4, §3.3.

Closed Year Name: error: see annotation to RRC 4, §3.3.

- (g) power to agree on behalf of the Syndicate or Closed Year Syndicate to fund the obligations of any third party in connection with any Claim or any other matter;

Closed Year Syndicate: error: see annotation to RRC 4, §3.3.

- (h) power to agree any ex gratia or goodwill payment or any extra contractual obligation of or on behalf of the Syndicate or Closed Year Syndicate;

ex gratia: an ex gratia payment does not necessarily reduce the underlying debt.

Closed Year Syndicate: error: see annotation to RRC 4, §3.3.

- (i) power to enter into any arrangements which ERL considers will or may avoid or reduce any liability in respect of a Claim;

NOTE: Equitas Re's standard-form settlement agreement contains insurance contract buy-back clauses and general releases.⁹³

Claim: "Claim" includes a potential claim.

- (j) power to use the names of any or all of the Names or Closed Year Names in exercise of any or all of the powers conferred on ERL by this Agreement;

Closed Year Names: error: see annotation to RRC 4, §3.3.

- (k) power to commute or enter into an agreement for the discharge of any liability or prospective liability under any insurance or reinsurance policy, or for the recovery of any asset;

commute: Equitas Re is positively⁹⁴ disposed to commuting⁹⁵ outward and⁹⁶ inward reinsurance contracts, from which it appears to derive significant net receipts⁹⁷ or other benefit.⁹⁸

⁹² See p.75.

⁹³ See p.85.

⁹⁴ See recently for example Equitas Holdings RA fye March 31, 2002, p.7-8 (Chief Executive's Officer's review):-
Reinsurers' share of paid claims amounted to £424 million in the year ended 31 March 2002 (2001: £1 billion). Reinsurance recoverable on claims paid will normally reduce in line with claims payments and as outwards reinsurance contracts are commuted. During the past year, we completed the negotiation of 88 commutation agreements, down slightly from the previous year.

We are aggressively working to commute reinsurance contracts wherever we can do so on appropriate terms. Terminating complex reinsurance arrangements in exchange for a cash settlement has many advantages: Reinsurance asset does not produce investment income until it is collected. By converting reinsurance asset to cash through commutations, we will increase future investment income. Realising reinsurance asset through commutations has helped keep the value of the investment

- (l) power to exercise any rights of subrogation of the Syndicate or Closed Year Syndicate or any of its members or to exercise any other rights of recovery of the Syndicate or Closed Year Syndicate or any of its members (whether by way of contribution, indemnity or otherwise howsoever) in respect of losses sustained or expenses incurred by it or by any of them;

Closed Year Syndicate: error: see annotation to RRC 4, §3.3.

or any of its members: suggests misunderstanding of the SYA-level collectivisation rule. A syndicate properly so called is incapable of having members.⁹⁹

- (m) power to engage in any discussion or negotiation with any insured person, reinsured person, class of insured or reinsured persons, reinsurer, broker, legal or other representative of insureds or any other party in relation to any Claim or any other matter;

reinsured person: does not include a Name.

- (n) power to enter into, amend or cancel any claims handling arrangement irrespective of whether such arrangement forms part of the original contract;
- (o) power to enter into, amend or cancel any claims collection or reinsurance recovery collection arrangement with any broker, specialist collection agency or any other debt collector;
- (p) power to instruct lawyers, claim adjusters or any other experts or consultants in any matter;

power to instruct lawyers: Equitas Re retains numerous law firms, some of which also act for self-regulators-at-Lloyd's, the Corporation and relevant SYA participants. Equitas Re particularly retains the US law firms already mentioned in service-of-suit clauses.

power to instruct ... claims adjusters:

power to instruct ... any other experts or consultants:

- (q) power to enter into any market arrangement with any insured person or class of persons or their representatives or insurers or reinsurers whereby ERL or the Syndicate or Closed Year Syndicate would be bound to adopt a particular settlement policy in relation to any claim or category of claims, or which could extend or increase the liability of ERL or the Syndicate or Closed Year Syndicate;

portfolio at a steady level, even though we have paid more than £12 billion in claims since Equitas began operations. Reinsurance recovery is an expensive and time consuming process. Commuting reinsurance arrangements will reduce future processing and collection expenses. Collection of reinsurance debt is hampered by individual and market-wide disputes which affect all reinsurers, not only Equitas. These disputes can often be more easily settled through a commutation than through litigation or arbitration. Commutations eliminate the risk of non-payment due to reinsurer insolvency. When possible, Equitas prefers to negotiate 'global' commutations, which not only collect outwards reinsurance proceeds, but also extinguish liabilities for inwards reinsurance. Commutations, therefore, are a means by which we can reduce our claims outstanding, including in many cases asbestos liabilities.

Equitas Ltd. is understood to have a Commutations Director. Equitas Ltd. appears to deal with commutations through its regular claims handling apparatus: see for example Equitas Holdings RA fye March 31, 2002, p.6 (Chief Executive Officer's review, "Claims management").

⁹⁵ See generally for example *Korea Foreign Insurance Co. v Omne Re SA* [1999] Lloyd's Rep IR 509 (CA).

⁹⁶ See recently for example Equitas Holdings RA fye March 31, 2002, p.6 (Chief Executive Officer's review): "[A]s part of our strategy to commute the reinsurance asset, we routinely commute inwards liability as well. This activity resulted in closing out a material amount of asbestos exposure during the past year."

⁹⁷ See recently for example Equitas Holding RA fye March 31, 2002, p.2 (Chairman's statement): "The Group once again made good progress in nearly all other areas of the business. Claims settlements, the collection of reinsurance and the commutation of reinsurance contracts produced significant contributions." And see *ibid.*, p.3 ("Since Equitas was established, it has been necessary to strengthen gross discounted claims reserves by an aggregate of more than £1.5 billion. Notwithstanding this increase, accumulated surplus has risen from £588 million to £679 million and the solvency margin has risen from 5.6 per cent to 10.3 per cent. This performance is a result of the successful actions taken by management in settling claims, negotiating commutations and managing our investment portfolio."). And see *ibid.*, p.6 (Chief Executive Officer's review): "At 31 March 2002 gross undiscounted asbestos reserves amounted to £6.4 billion (2001: £8.1 billion), while gross asbestos reserves, discounted to take account of the time value of money, amounted to £3.6 billion (2001: £4.6 billion). Asbestos claims payments and the value of liabilities extinguished through commutations during the past year amounted to £1.1 billion."

⁹⁸ See recently for example Equitas Holdings RA fye March 31, 2002, p.6 (Chief Executive Officer's review): "In addition to the gradual reduction of claims activity over time, the decrease in claims paid reflects the fact that we have by now closed out many of our largest claims, either through policy buyouts or commutations."

⁹⁹ See p.186.

Closed Year Syndicate: error: see annotation to RRC 4, §3.3.

- (r) power to enter into any agreement to indemnify or release any other person, in relation to any of the above matters;
- (s) power to represent the Syndicate or Closed Year Syndicate in any market or industry discussion group (which may also involve post 1992 years of account); and

Closed Year Syndicate: error: see annotation to RRC 4, §3.3.

- (t) power to establish any security in respect of any policy liabilities which are comprised in the relevant Syndicate 1992 and Prior Business.

Delegation

- 9.3 ERL may from time to time (without affecting its duties, obligations and responsibilities hereunder) during the term of this Agreement, in its absolute discretion, appoint or employ sub-agents or contractors in any part of the world as it shall determine to be necessary or expedient in connection with the performance of its duties, obligations and responsibilities under this Agreement and may delegate to Equitas or any other sub-agent or contractor any or all of the services to be provided by it, any or all of the duties to be performed by it or any or all of the powers, including this power of delegation, to be exercised by it under this Agreement but ERL shall be responsible for the acts and omissions of any such sub-agent or contractor, and the Names and the Closed Year Names acknowledge that it is intended that all the rights, powers, duties and obligations of ERL under this Agreement will be delegated to Equitas under the Retrocession Agreement and may be delegated by Equitas to third parties and their sub-contractors.

NOTE: this provision applies only to Equitas Re's RRC 4, §9.1 run-off function, not its *ibid.*, §3.1 reinsurance function.

sub-agent: Equitas Ltd. is Equitas Re's sub-agent under this clause. Equitas Re is itself the EquitasRe-reinsured SYA participant's directly appointed direct agent: see RRC 4, §9.1.

during the term of this Agreement: RRC 4 has no fixed term. On RRC 4's termination, see *ibid.*, §19.

appoint or employ sub-agents or contractors: for standardised terms and conditions, see for example RRCs 6 and 13.

all the rights, powers, duties and obligations of ERL under this Agreement: *viz.*, Equitas Re's functions under any part of RRC 4, not just under *ibid.*, Part II. This is the clause empowering Equitas Re to retrocede its *ibid.*, §3 functions to Equitas Ltd., to which extent it is in the wrong RRC 4 location (RRC 4, §9.4(c) is similarly mis-located). The erroneous positioning within RRC 4 of this clause may contribute to confusion between Equitas Re's RRC 4, §3 reinsurance function and its *ibid.*, §9 run-off agency function.

may delegate to Equitas ... will be delegated to Equitas: see RRC 5, §5. Singularly, in relation to Equitas Re's RRC 4, §3.1 reinsurance function, there appears to be no RRC 4 equivalent empowering Equitas Re to buy retrocession from Equitas Ltd.

and may be delegated by Equitas to third parties and their sub-contractors: Equitas Ltd. does not in RRC 5 expressly sub-delegate to any third party.¹⁰⁰

ERL's powers exclusive and irrevocable

- 9.4 It is expressly agreed that ERL and its delegates and sub-delegates will have irrevocable and exclusive power to manage each Run-off in accordance with the provisions of this Agreement and, subject to the provisions of the EATD, the ECTD and any Overseas Trust Deeds and to the fullest extent possible, shall manage each Run-off as if it were principal and, without prejudice to the generality of the foregoing, it is expressly agreed that:

and its delegates and sub-delegates: for "and" read "through": the delegatee cannot act exclusively of the delegator.

irrevocable: see similarly RRC 4, §§9.1, 9.2. See the annotation to RRC 4, §9.1, "irrevocably".

exclusive power: *cf.* RRC 4, §9.2 ("exclusive responsibility"). The EquitasRe-reinsured SYA participant cannot appoint a run-off agent in place of Equitas Re.

as if it were principal: the merely procedural run-off agency obverse of the SYA-level passivity rule; not to be confused with Equitas Re's RRC 4, §3 role, in which it actually is a principal, in which capacity it inherently has RRC 4, §9.2 functions of its own.

- (a) ERL and its delegates and sub-delegates are not bound to comply with any instructions or requests of any Name or Closed Year Name;

¹⁰⁰ On third-party service providers to Equitas Ltd., see p.79.

NOTE: *cf.* SUA 1 / SCA 1, §7.3. The notion of a natural SYA participant giving his managing agency any specific instructions in relation to any specific SYA-level transaction to which he is a party is necessarily repellent to the course of managing agency business at Lloyd's¹⁰¹ (knowing nothing of the specifics of any such transaction, he could in any event aspire to do so in only the most jejune terms).

requests: such as (for example) for an account of which Insurance Creditors have not been paid sufficient for the EquitasRe-insured SYA participant to alert Equitas Policyholders Trustee under RRC 7, §2.2.

Closed Year Name: error: see the annotation to RRC 4, §3.3.

- (b) in no circumstances will any Name or any Closed Year Name interfere with the exercise of the management or control of any Run-off; and

NOTE: *cf.* SUA 1 / SCA 1, §7.3. Inherent in SYA participation (whoever may be the reinsurer or managing agency) is the SYA-level passivity rule,¹⁰² which this provision merely reflects.

Closed Year Name: error: see the annotation to RRC 4, §3.3.

any Run-off: *viz.*, the run-off of any particular EquitasRe-insured liability.

- (c) in no circumstances will any Name or any Closed Year Name be entitled to receive directly payment of any amount payable by ERL in the performance of the Reinsurance Obligation in respect of any Claim, return premium or other amount in relation to the Syndicate 1992 and Prior Business of any Syndicate or Closed Year Syndicate of which that Name or Closed Year Name is a member (other than under clause 8 of this Agreement and schedule 5 or paragraph 13 of schedule 3 to this Agreement).

NOTE: on Equitas Re's discharge by actual payment of its RRC 4, §3.2 obligation, see *ibid.*, §3.4, which is where this provision should properly be. *Cf.* RRC 4, Sch. 3, §12.

Closed Year Name: error: see the annotation to RRC 4, §3.3.

Closed Year Syndicate: error: see the annotation to RRC 4, §3.3.

DUTIES AND LIABILITY OF ERL

ERL's standard of care

- 10.1 In performing its duties and exercising its powers under this Part II of this Agreement, ERL shall operate its business and conduct its affairs in a bona fide and businesslike manner and use all reasonable skill, care and diligence for the proper provision of services, performance of duties and exercise of powers by it under this Agreement but, without prejudice to its obligations under this Agreement, ERL shall not have any fiduciary obligations to the Names or the Closed Year Names.

NOTE: RRC 4 has no provision preventing the EquitasRe-insured SYA participant suing Equitas Re for breach of *ibid.*, §9. Nor has RRC 1: see *ibid.*, §4.5; Sch. 1, §1 definition of "Accepting Name's Claim", §(f); *ibid.*, definition of "Other Right", §(h). Nor has the EquitasRe-insured SYA participant assigned (in RRC 4, §4.1 or elsewhere) to Equitas Policyholders Trustee or anyone else his recoveries for Equitas Re's RRC §9 run-off agency actionable misconduct. But the EquitasRe-insured SYA participant is probably never going to know of any relevant actionable misconduct (see RRC 4, §§10.2 to 10.3 and relevant annotations thereto) — the punitive or exemplary damages cost of which is always met by the uninformed SYA stamp, never usually by the managing agency which committed the conduct — and even if he did know there appears to be no accounting mechanism at Equitas Re enabling the EquitasRe-insured SYA participant to be told of the financial implications for him personally (although in principle it should be easy to calculate in any particular insurance transaction).

under this Part II: logical: there is a clear and continuing distinction between Equitas Re's reinsurance functions under RRC 4, Part I ("Reinsurance"; §§2-8), and its run-off agency functions under *ibid.*, Part II (§§9-10).

all reasonable skill, care and diligence: a notion (argued by managing agencies in pre-R&R litigation¹⁰³ and in Lloyd's internal disciplinary proceedings¹⁰⁴) now judicially established irrefutably¹⁰⁵ (and self-regulatorily expressed¹⁰⁶) in relation to managing

¹⁰¹ See for example *Boobyer v David Holman & Co. Ltd. and Lloyd's (No. 2)* [1992] 1 Lloyd's Rep. 96 (Saville J); *Daly v Lime Street Underwriting Agencies Ltd.* [1987] 2 FTLR 277 (Staughton J).

¹⁰² Unlike conventionally at Lloyd's, the EquitasRe-insured SYA participant's interests are apparently actively overseen by someone, *viz.*, EquitasRe-reinsurance Trustees (see RRC 17, §2.1) and (to some extent) Equitas Policyholders Trustee (see RRC 7, §2.2).

¹⁰³ See for example *Deeny v Gooda Walker Ltd.* [1996] LRLR 183, 197 (Phillips J; duty of care by managing agency). And see *Henderson v Merrett Syndicates Ltd.* {1c} [1995] 2 AC 145, 199 *et seq.* (duty of care by a members' agency appointing a sub-agent managing agency under SMA 1).

¹⁰⁴ See for example *In the Matter of Green and Valentine*, Case No.8606/1, Findings of Fact [etc.], §58-66; Decision of the Appeal Tribunal, §18-21. And see *In the Matter of Grattan-Bellew, Parry, Raven, Nelson & Stratton*, Case No. 8601/4, Findings of Fact [etc.], §38-41.

agencies ordinarily at Lloyd's. See similarly RRC 5, §6.1. Equitas Re's duties and liability as a(n) EquitasRe-reinsured) SYA participant's run-off agent of a SYA participant are presumably identical to those of a managing agency in the same position.

Closed Year Names: error: see the annotation to RRC 4, §3.3.

Liability of ERL

- 10.2 ERL shall keep each Name and each Closed Year Name fully indemnified and held harmless at all times against all costs, losses, claims, damages or expenses including extra-contractual obligations or punitive or penal damages arising out of or relating to any acts and omissions (including without limitation any errors, omissions, breaches of contract and breaches of fiduciary duty) of ERL or any delegate or sub-delegate of ERL in relation to the Syndicate 1992 and Prior Business of any Syndicate or Closed Year Syndicate of which that Name or Closed Year Name was a member, whether in its own name or on behalf of and in the name of the Name or Closed Year Name PROVIDED THAT the indemnity in this clause 10.2 shall not apply in relation to any liability in respect of the Reinsurance Obligation.

fully indemnified: see the similar indemnity at RRC 4, §3.2 (Equitas Re's reinsurance obligation). See RRC 5, §6.3 (Equitas Ltd.'s similar indemnity to Equitas Re). The EquitasRe-reinsured SYA participant

punitive ... damages: cf. Equitas Re's personal liability under RRC 4, §3.2 for punitive and penal damages in the reinsurance context. Such claim components are expressly not recoverable under Lloyd's US Surplus-Lines Common-Use Trust Deed, §§1.3 and 2.3(e) and Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §§1.3 and 2.3(e). EATD and LATD contains no such restrictions. RRC 4, §10.2 punitives may arise out of Equitas Re's claims handling misconduct as RRC 4, §9 run-off agent rather than as *ibid.*, §3 reinsurer, and be attributable to the EquitasRe-reinsured SYA participant. Ordinarily at Lloyd's: (1) the managing agency never discloses to SYA participants the existence or amount of any exemplary or punitive damages component of a coverage adjudication or the extent to which that component is attributable to the managing agency's own misconduct; (2) there is no mechanism for the SYA participants to reclaim any such exemplary or punitive damages component from the managing agency personally. Much pre-R&R litigation by SYA participants against their members' and managing agencies was concerned with obtaining compensation for actionable acquisition or transmission of insurance liabilities,¹⁰⁷ but that is a different matter. On relevant claims, see *ibid.*, §10.3.

liability in respect of the Reinsurance Obligation: on that liability, see RRC 4, §3.1 *et seq.* RRC 4 observes a clear distinction between *ibid.*, §3 functions and *ibid.*, §9 functions: see for example *ibid.*, §10.1.

- 10.3 In the event of any claim being made against any Name or Closed Year Name in respect of which ERL may be required to indemnify the Name or Closed Year Name pursuant to clause 10.2 above, (subject to being fully indemnified to the reasonable satisfaction of the Substitute Agent against all reasonable out-of-pocket costs and expenses incurred by any Name or Closed Year Name) the Name or Closed Year Name or in each case the Substitute Agent on its or his behalf:

NOTE: no mechanism exists or is required whereby any EquitasRe-reinsured SYA participant will ever find out from Equitas Re or anyone else whether a particular coverage judgment or award has a punitive damages component attributable to Equitas Re's RRC 4, §9 misconduct. Equitas Re appears to be under no express obligation to inform any EquitasRe-reinsured SYA participant, Equitas Policyholders Trustee or EquitasRe-reinsurance Trustees of any such adjudication.

¹⁰⁵ A full discussion is at *Astor's Law of Lloyd's, 2nd Ed.* See for example *Henderson v Merrett Syndicates Ltd.* {1a} [1994] 2 Lloyd's Rep. 193, 197-198 (Saville J), not overruled at either *ibid.*, {1b} [1994] 2 Lloyd's Rep. 468 (CA) or *ibid.*, {1c} [1995] 2 AC 145 (HL) *Ibid.*, 197:-

Lloyd's could not exist as an insurance and reinsurance market unless the business is conducted by professionals who must be given the widest possible powers to act on behalf of the Names. Thus the underwriting agency agreement makes absolutely clear that the Name must leave it exclusively to the underwriting agents actually to run the business. The standard of behaviour to be expected of the underwriting agents in carrying out this task is an entirely different matter. The underwriting agency agreement contains no express provisions in this regard, but I do not find this in the least surprising, since it seems to me literally to go without saying that the underwriting agents must act with reasonable care and skill in exercising their authority and carrying on the underwriting business on behalf of the Name. The very fact that the agents are given the widest possible authority to act on behalf of the Name, together with the fact that the Name's potential liability for the actions of the agents is unlimited and the further fact that the agents receive remuneration for exercising their professional skills on behalf of the Name, seem to me to point irresistibly to the conclusion that in such a relationship the law does (as a matter of common sense it should) impose a duty of reasonable care and skill upon the underwriting agents of the kind alleged by the Names, which could only be modified or excluded by clear agreement between the parties. I can find nothing in the underwriting agency agreement which indicates that this duty (the ordinary one owed by any professional person) is in any way modified or excluded in the present cases

¹⁰⁶ See for example SUA 1 / SCA 1, §4.2(a).

¹⁰⁷ See for example *Deeny v Gooda Walker Ltd.* {3} [1996] LRLR 183 (Phillips J); *Arbuthnot v Feltrim Underwriting Agencies Ltd.* [1995] CLC 437 (Phillips J); *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd's Rep. 618 (Potter J); *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265 (Cresswell J); *Berriman v Rose Thomson Young (Underwriting) Ltd.* [1996] LRLR 426 (Morison J); *Wynniatt-Husey v R.J. Bromley (Underwriting Agencies) Plc* [1996] LRLR 310 (Langley J); and see generally the cases listed at Kerr Panel Evaluation.

- (a) shall procure that notice of such claim is given to ERL as soon as reasonably practicable;

NOTE: in the case of a relevant claim arising in the course of a coverage dispute (which it almost invariably would), Equitas Re will already know of it and presumably take (and RRC 4, §10.1 requires that it take) an active interest in the defence.

- (b) shall not make any admission of liability, agreement or compromise with any person, body or authority in relation to any such claim without prior consultation with and the prior agreement of ERL which agreement shall not be unreasonably withheld or delayed;

NOTE: in the case of a relevant claim arising in the course of a coverage dispute, the SYA-level passivity rule prevents the EquitasRe-reinsured SYA participant from taking any direct part in the first place. Nor would he personally ever be the recipient of any relevant notification: it would go to Equitas Re instead.

- (c) shall take such action as ERL may reasonably request to avoid, dispute, resist, appeal, compromise or defend such claim or any adjudication in respect of that claim; and

NOTE: see annotation to (b) above.

- (d) if so required by ERL in writing, shall use all reasonable endeavours to ensure that ERL is placed in a position to take on or take over the conduct of all proceedings and/or negotiations of whatsoever nature arising in connection with the claim in question and provide such information and assistance as ERL may reasonably require in connection with the preparation for and conduct of such proceedings and/or negotiations.

NOTE: in the case of a relevant claim arising in the course of a coverage dispute (which it almost invariably would), Equitas Re will already know of it and presumably take (and RRC 4, §10.1 requires that it take) an active interest in the defence.

...

PART IV — GENERAL PROVISIONS

FURTHER ASSURANCE

- 14.1 The Substitute Agent undertakes, if so requested by ERL or any delegate or sub-delegate of ERL, to ratify and confirm any act or thing lawfully done or caused to be done by ERL or any delegate or sub-delegate of ERL in good faith in the performance of its duties under this Agreement and to procure and do all such other acts and things as may be necessary to enable the provisions of this Agreement to be carried out and given full force and effect and fully to co-operate with ERL to enable ERL or any delegate or sub-delegate of ERL to perform the obligations of ERL under this Agreement.
- 14.2 The Substitute Agent hereby undertakes at the reasonable request of ERL or any delegate of ERL to exercise any power of attorney to execute any deed or sign any document where it is necessary or expedient to do so in the exercise by ERL or any delegate of ERL of the authority delegated to ERL under clause 11.1.

BOOKS AND RECORDS

NOTE: cf. RRC 5, §7.

Access to Books and Records

- 15.1 The Substitute Agent agrees, upon or after the date on which the last of the conditions in clause 2.1 is satisfied, to transfer or procure the transfer of such Books and Records of each Syndicate and Closed Year Syndicate as are in the custody, possession or control of the Substitute Agent which relate exclusively to the Syndicate 1992 and Prior Business of that Syndicate or Closed Year Syndicate to ERL or as ERL may direct, which ERL shall then hold as agent on behalf of that Syndicate.

Return of Books and Records on termination

- 15.2 If this Agreement is terminated in accordance with its terms, ERL shall, at the end of the period referred to in clause 19.2, return to the Substitute Agent or, at the request of the Substitute Agent, the relevant Managing Agent or any successor, such Books and Records as have been transferred to it and agrees to maintain the confidentiality of the Books and Records in accordance with clause 17.

terminated in accordance with its terms: see relevant annotation to RRC 4, §19.2.

ERL's maintenance of Books and Records

- 15.3 ERL shall, until the Syndicate 1992 and Prior Business of each Syndicate and Closed Year Syndicate has been discharged in full:

- (a) use all reasonable endeavours to keep safe all Books and Records relating to that Syndicate or Closed Year Syndicate delivered to it by the Substitute Agent or the relevant Managing Agent in accordance with such reasonable data and document retention policy as may be issued by ERL from time to time;

relating to that Syndicate: *viz.*, to the relevant RRC 4, Sch. 1 SYA. *Cf.* the RRC 1, Sch. 1, §1, EATD, §1, and LATD, §1.28 definitions of “Syndicate”, which would require Equitas Re to keep books and records by SYA participant.

or Closed Year Syndicate: infelicitous: no Closed Year Name has any relevance to Equitas Re: see RRC 4, §3.3.

data and document retention policy as may be issued by ERL from time to time: this is discussed elsewhere.¹⁰⁸ Equitas Re has a documentation destruction policy.¹⁰⁹

- (b) maintain records of its conduct of the Run-off of each Syndicate and, where relevant Closed Year Syndicate, showing the same separately from its conduct of the business of the other Syndicates, but only insofar as ERL determines that such separate books and records are necessary for the proper carrying on of its business;

NOTE: RRC 4 does not otherwise provide expressly for Equitas Re to give any relevant account to any EquitasRe-reinsured SYA participant. Relevant records kept at SYA level will be sufficient to determine the liability of a participant on that SYA: his line on the SYA will be known, and the stamp’s line on the risk will be known. Practical difficulty may arise in sorting data by individual EquitasRe-reinsured Member (*viz.*, in relation to all relevant SYAs on which he participated). *Cf.* LATD, §7.8. Set-off is discussed elsewhere.¹¹⁰

as ERL determines: but Equitas Re must exercise due skill and care: see RRC 4, §10.1. If self-regulators-at-Lloyd’s and or external insurance regulators (such as the FSA) genuinely believe that the EquitasRe-reinsured SYA participant remains liable in any genuine personal sense (rather than as merely the EquitasRe-assured’s-at-Lloyd’s conduit to common-use and other relevant funds at the Lloyd’s enterprise), then Equitas Re must presumably maintain the records necessary to establish that liability, discharged as well as undischarged (in practice there is no such liability¹¹¹).

- (c) at a charge which, in the reasonable opinion of ERL, represents the cost of making the information available, make available to any Name or Closed Year Name and to the Substitute Agent on behalf of that Name or Closed Year Name at the request of the Name or Closed Year Name, in connection with any Legal Proceedings brought and conducted by that Name or Closed Year Name in respect of the Syndicate 1992 and Prior Business of any Syndicate or Closed Year Syndicate of which that Name or Closed Year Name was a member is a party, all such books and records as are referred to in sub-clauses (a) and (b), and shall permit that Name or Closed Year Name or the Substitute Agent to take copies thereof, at his own expense, whether in person or by their duly authorised agents; and

at the request of the ... Closed Year Name: error: the Closed year Name is in practice completely irrelevant: see RRC 4, §3.3.

any legal proceedings brought and conducted by that Name or Closed Year Name: such proceedings would presumably be principally either: (1) coverage litigation to which the EquitasRe-reinsured SYA participant happened (passively, in the ordinary way) to be a party; (2) litigation by the EquitasRe-reinsured SYA participant actively against Equitas Re for RRC 4, §9 misconduct: see *ibid.*, §§10.1 and 10.2. Short of legal proceedings

- (d) following any adjustment of liabilities pursuant to clause 3.5 and schedule 3 to this Agreement and at a charge which, in the reasonable opinion of ERL, represents the cost of making the information available, make available to any Name or Closed Year Name and to the Substitute Agent on behalf of that Name or Closed Year Name at the request of that Name or Closed Year Name in connection with any Legal Proceedings brought against that Name or Closed Year Name in respect of the Syndicate 1992 and Prior Business of any Syndicate or Closed Year Syndicate of which that Name or Closed Year Name was a member, all such books and records as are referred to in sub-clauses (a) and (b), and shall permit that Name or Closed Year Name or the Substitute Agent to take copies thereof, at his own expense, whether in person or by their duly authorised agent,

brought and conducted by that Name or Closed Year Name: see the corresponding annotation to RRC 4, §15.3(c).

PROVIDED THAT the obligation in sub-clauses (c) and (d) above shall not apply in any circumstances where, in the reasonable opinion of ERL, making such information available or permitting

¹⁰⁸ See p.89.

¹⁰⁹ See p.90.

¹¹⁰ See p.75.

¹¹¹ See p.165 *et seq.*

such copies to be taken would breach privilege or otherwise be prejudicial to the interests of ERL or any other Name or Closed Year Name in relation to any 1992 and Prior Business.

- 15.4 All information and data made available in accordance with clauses 15.3(c) and (d) will be provided at the risk of the relevant Name or Closed Year Name. ERL and Equitas shall accept no responsibility therefor nor shall they make or be deemed to make any representation, warranty or undertaking as to the accuracy or fitness of such information and data for the purpose of which they are they are used by any person.

NOTE: There are typical provisions requiring Equitas Re to preserve relevant records given to it¹¹² and maintain records of its own conduct of the run-off.¹¹³ Equitas Re must send every EquitasRe-reinsured SYA participant a copy of its annual report and accounts until all EquitasRe-reinsured liabilities have been run off.¹¹⁴ Equitas Re is also required to make available a potentially wide range of records to any foreground or background principal if required in connection with “any” legal proceedings “brought and conducted” by the principal in relation to the Syndicate 1992 and Prior Business.¹¹⁵

REPORTS AND ACCOUNTS

16. ERL shall, until the Syndicate 1992 and Prior Business of each Syndicate has been discharged in full, provide to the Names and to the Substitute Agent copies of the annual report and consolidated accounts of the Equitas Group and/or such other documents as may be agreed between ERL and the Substitute Agent on behalf of the Names from time to time.

CONFIDENTIALITY

NOTE: cf. RRC 5, §8.

Restrictions on use of confidential information

17. Each of ERL, the Substitute Agent and Lloyd’s shall use all reasonable endeavours to ensure that it and its respective employees, agents, subcontractors and representatives shall:
- (a) keep the Confidential Information strictly private and confidential and not disclose any Confidential Information to any person other than:
 - (i) in the case of the Substitute Agent, to discharge the duties of the Substitute Agent to Names and Closed Year Names;
 - (ii) as is necessary in the ordinary course of business, including to its auditors, legal advisers or other consultants;
 - (iii) as may be required (including under standard procedures or rules of court) by a court of competent jurisdiction in the exercise of such jurisdiction;
 - (iv) any government department or governmental agency having jurisdiction over the party disclosing, in the exercise of such jurisdiction, but only to the extent that disclosure is required by applicable laws, regulations or rules relating thereto;
 - (v) any regulatory agency or professional body of which a party may be a member (including Lloyd’s) but only to the extent required by rules (including, without limitation, professional or ethical rules or regulations applicable to the party disclosing); or
 - (vi) in the case of ERL, under the Retrocession Agreement, any Information and Administration Agreement, any Run-off Administration Agreement entered into in respect of any Syndicate or Syndicates or the Completion Accounts and Co-operation Agreement, or to the Trustee, provided that any recipient of such Confidential Information under such agreement shall have entered into a confidentiality undertaking in respect of such Confidential Information;
 - (b) in the case of ERL and Lloyd’s, use all Confidential Information solely for the purpose of performing its rights and obligations under this Agreement or, in the case of ERL, in the proper

¹¹² RRC 4, §15.3(a).

¹¹³ RRC 4, §5.3(b).

¹¹⁴ RRC 4, §16.

¹¹⁵ RRC 4, §15.3(c). Equitas Re may make a reasonable charge: *ibid.*

performance of its business in relation to 1992 and Prior Business and, in the case of Lloyd's, for the implementation of the Reconstruction and Renewal Byelaw and in the discharge of its regulatory functions and not permit any other person to use it for any other purpose but without prejudice to the power of the Council under the Information and Confidentiality Byelaw (No. 21 of 1993); and

- (c) in the case of the Substitute Agent, use all Confidential Information solely in the discharge of its obligations to Names and Closed Year Names.

| **NOTE:** see the detailed provisions at RRC 4, §17.

CURRENCY OF PAYMENT

18. Where any amount payable by a Name hereunder in respect of his Name's Premium is an amount denominated in US Dollars or Canadian Dollars, then, unless the amount is paid out of the LATF (in respect of a US Dollar liability) or out of the LCTF (in respect of a Canadian Dollar liability), the Name shall instead pay an amount in sterling being one pound sterling for each US\$1.51 and one pound sterling for each Can\$2.05.

| **NOTE:** on RRC 4, consideration, see *ibid.*, §5 (where *ibid.*, 18 more properly belongs).

CONSEQUENCES OF TERMINATION

Termination

- 19.1 Upon termination of this Agreement pursuant to clause 2.2 all provisions of this Agreement (other than clauses 15.2, 17, 20, 22, 23, 24 and 25 in each case to the extent capable of application after termination of the other provisions) shall cease and terminate forthwith and no party to this Agreement shall have any claim of any nature whatsoever against any other party to this Agreement except for any claim that may have accrued prior to the date of termination.

| **NOTE:** the clause is obsolete: see RRC 4, §2.2.

Termination of powers in relation to Run-off

- 19.2 In the event that this Agreement terminates for any reason in accordance with its terms, ERL shall continue to be entitled for a period of 6 months, or such lesser period as is necessary to enable the Substitute Agent to resume responsibility for the Run-off, to exercise the powers conferred on it as agent of the Names and the Closed Year Names by virtue of clause 9.

| **NOTE:** not presently relevant.

terminates for any reason in accordance with its terms: RRC 4 expressly provides for its own termination only as follows: (1) *ibid.*, §2.2 (termination for failure to satisfy *ibid.*, §2.1 conditions; now irrelevant); (2) *ibid.*, §3.9 (no termination for non-payment of EquitasRe-reinsurance premium, or for non-disclosure; now irrelevant).

to enable the Substitute Agent to resume responsibility for the Run-off: running off but not RTCing.

WAIVER

20. Any delay by any party in exercising, or failure to exercise, any right or remedy under this Agreement shall not constitute a waiver of the right or remedy or a waiver of any other right or remedy and no single or partial exercise of any right or remedy under this Agreement or otherwise shall prevent any further exercise of the right or remedy or the exercise of any other right or remedy. The rights and remedies of each party under this Agreement are cumulative and not exclusive of any rights or remedies provided by law.

INVALIDITY

21. If any provision of this Agreement other than the Reinsurance Obligation is held to be invalid or unenforceable, then such provision shall (so far as it is invalid or unenforceable) be given no effect and shall be deemed not to be included in this Agreement but without invalidating any of the remaining provisions of this Agreement.

NOTICES

- 22.1 Any notice or notification to be given hereunder shall be in writing and may be given either by personal delivery, first class post or facsimile in the case of the Names and the Closed Year Names to the Substitute Agent and in the case of the Substitute Agent and any other signatory to this Agree-

ment to the address of such signatory set out in this Agreement or to such other address as any such signatory may have notified as being its address for service for the purposes of this Agreement.

- 22.2 ERL shall annually make a written request to each Name at his last notified address for, and each Name agrees to provide within 21 business days of such request, written confirmation of, or notification of any amendment to, the address of that Name.

to each Name: does not include “Closed Year Name”, suggesting the long-term intent is for the most recent conventionally inward-RTCing SYA participant to bear the financial risk (absent that particular RTC contract being for any reason avoided).

VARIATION

23. No variation, supplement, deletion or replacement of this Agreement (or of any of the documents referred to herein) shall be valid unless it is in writing and signed by or on behalf of each of the signatories hereto.

variation: RRC 4 was purportedly amended by Reinsurance and Run-Off Contract Amendment Agreement, December 17, 1997 — a copy could not be timeously obtained by the Publisher — which apparently provided for: (1) the events in which Equitas Re is entitled to suspend full payment to an EquitasRe-assureds-at-Lloyd’s;¹¹⁶ (2) return of premium the “as at” date for ascertaining EquitasRe-reinsured SYA participant’s share of return premium was changed from September 4, 1996 to December 31, 1995 “as the quality of information available at that date allowed a more accurate assessment of each Reinsured Name’s share”.¹¹⁷ (2) permanent suspension by Equitas [Re] of claims payments where relevant trust fund becomes controlled by local regulator.¹¹⁸

or any of the documents referred to herein: this is inappropriate in relation to, for example, the PTD, LATD, LCTD, and all other documents referred to in RRC 4 to the extent relevant RRC 4 signatories (such as, for example, Equitas Re, Equitas Ltd., AUA 9 and AUA 10) are not and need not be parties.

COSTS

24. Each of ERL, Lloyd’s, the Substitute Agent, Equitas, the Managing Agent’s Trustees, [and] the Trustee shall, except as otherwise agreed in writing, pay its own costs incurred in connection with the preparation and implementation of this Agreement.

GOVERNING LAW, JURISDICTION AND SERVICE OF PROCESS

Governing law and jurisdiction

- 25.1 All rights and obligations, of whatever sort, of any person, arising out of, or in any way related to or connected with, this Agreement and all the terms and provisions hereof and all questions of construction, validity and performance hereunder and all appointments and authorities granted pursuant hereto shall be governed by and construed in accordance with the laws of England. In relation to any proceeding to enforce the rights and/or obligations of any person arising out of, or in any way related to or connected with this Agreement and all appointments and authorities granted pursuant to this Agreement each of the parties hereto, including for the avoidance of doubt each Name and each Closed Year Name for his own part, irrevocably and unconditionally agree that the High Court of

¹¹⁶ Lloyd’s Statement of [Equitas Re] Reinsurance, December 27, 1997, cover letter, p.1-2:-

The Reinsurance and Run-off Contract dated 3 September 1996 ... was recently corrected and amended in several respects with [AUA 9] ... acting as substitute agent on behalf of Reinsured Names pursuant to directions of the Council of Lloyd’s. The main changes concern certain aspects of return premium rights. It was originally envisaged that Names’ share of return premium would be based on data as at the time Equitas became operational on 4 September 1996. As the quality of information available as at 31 December 1995 allowed a more accurate assessment of each Name’s share, the basis for calculation was changed to that date. The Lloyd’s Settlement Offer Document dated July 1996 stated that Names’ return premium rights could not be assigned or transferred except as part of a Name’s estate. The reason for this was to avoid creating any circumstances in which it might be argued that the Equitas reinsurance involved the issue of a security under US Securities Laws. The non-assignability provision was inadvertently not reflected in the Reinsurance Contract which has now been corrected. Finally, the date for waiver of return premium rights has been extended by a year to 31 March 1998 to enable Names who wish to waive these rights to provide written notification to this effect to Equitas. A waiver of return premium will be irrevocable.

And see for example Equitas Holdings RA fye March 31, 1998, p.25 (Directors’ report). And see Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 written members’ resolution), §2, definition of “Reinsurance Contract”.

¹¹⁷ Equitas Holdings RA fye March 31, 1998, p.25 (Directors’ report). Note the use of the phrase “Reinsured Name”, which is used formally only in RRC 7, not in RRCs 4 or 5.

¹¹⁸ Lloyd’s Statement of [Equitas Re] Reinsurance, December 27, 1997, cover letter, p.2: RRC 4:-

has been amended to widen the circumstances in which Equitas could suspend payments to policyholders and treat these as discharged where a governmental or regulatory authority takes control of a trust fund maintained overseas. This change was made to provide for the different regulatory requirements to which such overseas deposits may be subject.

England and Wales shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature which may arise out of or in connection with this Agreement and all appointments and authorities granted pursuant hereto or any Name's or Closed Year Name's membership of Lloyd's or underwriting of 1992 and Prior Business and that accordingly, any suit, action or proceeding arising out of such matters shall be brought in such court and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the High Court of England and Wales and irrevocably waives (a) any objection which it or he may have now or hereafter to any such suit, action or proceeding being brought in such court and (b) any claim that any such suit, action or proceeding has been brought in an inconvenient forum, and further irrevocably agrees that a judgment in any suit, action or proceeding brought in the High Court of England and Wales shall be conclusive and binding upon such party and may be enforced in the courts of any other jurisdiction.

All rights and obligations, of whatever sort, of any person, arising out of, or in any way related to or connected with, this Agreement: the provision by definition cannot bind persons not party to RRC 4; and see RRC 4, §3.7 ("... this Agreement is not intended to and does not create any obligations to, or confer any rights upon, Insurance Creditors or any other persons not parties to the Agreement"). Query whether the contract can withhold its benefits but impose its burdens on persons not party to it, and the legal basis on which such an incidence can bind a stranger to RRC 4 — arguably this provision does not bind any EquitasRe-assured-at-Lloyd's.

shall be governed by and construed in accordance with the laws of England: *cf.* the General Undertaking. English law governs RRC 4. The EquitasRe-reinsured insurance contract's governing law is undisturbed.

High Court: examples of Equitas Re litigating in England include *Mander v Equitas Ltd.* [2000] Lloyd's Rep IR 520 (Morison J); *Trygg Hansa Insurance Co. Ltd. v Equitas Ltd.* [1998] 2 Lloyd's Rep. 439 (Judge Jack QC); *Baker v Black Sea & Baltic General Insurance Co. Ltd.* [1998] Lloyd's Rep IR 327 (HL).

Service of Process

25.2 Each Name and Closed Year Name not domiciled in the United Kingdom hereby irrevocably appoints the Substitute Agent as agent to accept service of any proceedings in the English courts on his behalf. If for any reason such agent shall cease to act as agent for service of process of any Name, that Name or Closed Year Name shall forthwith appoint a replacement agent, approved by ERL, in London. Failing such appointment within 15 days after demand by ERL, ERL shall be entitled to appoint another agent on behalf of the Name or Closed Year Name. Nothing herein shall affect the right to serve process in any other manner permitted by law.

NOTE: Every Name and Closed Year Name not domiciled in the UK irrevocably appoints AUA 9 as his agent to accept service of English proceedings.¹¹⁹

If for any reason such agent shall cease to act as agent for service of process: Just as AUA 9 was appointed by the Council without any involvement of any relevant Member, so AUA 9's board is capable of dissolving the company, winding it up etc similarly. No relevant Member will ever know.

AS WITNESS the hands of the duly authorised representatives of the parties hereto the date and year first above written.

NOTE: infelicitous: the parties signed not here but immediately after RRC 4, Schedule 6.

¹¹⁹ RRC 4, §25.2. IF AUA 9 ceases to act as such, the principal agrees to "forthwith" appoint a replacement in London approved by Equitas Re, failing which within fifteen days of Equitas Re's demand, Equitas Re may appoint another agent for him: *ibid.*

SCHEDULE 1 — THE SYNDICATES

NOTE: RRC 4, Sch 1 contains a list of the around 770 SYAs whose participants were EquitasRe-RTCed — viz., in relation to their SYA-collectivised accounts, the Council and the DTI determined that the RRC 4, §3 product could have a RTC character. Every participant on every RRC 4, Sch. 1-listed SYA is an EquitasRe-reinsured SYA participant. Appropriately, no Closed Year Syndicates (in which participate the “Closed Year Names”) is listed: see for example RRC 4, parties, definition of “Closed Year Syndicates”, viz., the accounts of participants on SYAs “reinsured to close whether directly or indirectly into the Syndicates ...”. In the all but impossible event of a relevant conventional RTC transaction failing (see RRC 4, §3.3), the relevant SYA should be added to the *ibid.*, Sch. 1 list. UYs represented on the initial RRC 4, Sch. 1 list are 1965 (1 SYA), 1966 (2), 1968 (4), 1970(1), 1974(2), 1976(2), 1977(3), 1978 (2), 1979 (2), 1980 (4), 1981 (7), 1982 (17), 1986 (10), 1987 (7), 1988 (12), 1989 (64), 1990 (155), 1991 (159), 1992 (111), 1993 (240), 1995 (2). Assuming each SYA had fifty participants, and each stamp subscribed to two hundred slips, EquitasRe-reinsurance involves a total of almost eight million separate insurance contracts, which demonstrates the front-office impracticability of the SYA-level separate contracts rule and explains why relevant set-off is done at syndicate level.

The Sch. 1 in the RRC 4 version (FW962500.261/2+) used in this Edition contains seven columns: from left to right “Syndicate No.”, “Year of Account”, “Managing Agent”, “Shortfall £.000”, “Shortfall £US\$.000”, “Shortfall Can\$, 000”, and “Syndicate Premium £”. Only the first three columns contain data: hence this Appendix’s three columns of data. The Publisher is aware of at least one other RRC 4 version, FW960630.015/58+, in which Sch. 1 has data in the “Syndicate No.”, “Year of Account”, “Managing Agent”, and “Syndicate Premium £” columns, and the figures in the latter column have not been blacked out (and see also version FW962500.261.2)

Syndicates: see RRC 4, Sch. 2, §1 definition of “syndicates” and “Syndicates”.

Syndicate No. Year of Account Managing Agent

2	1993	CLAREMOUNT UNDERWRITING AGENCY LIMITED
10	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
10	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
10	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
11	1989	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
11	1990	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
12	1984	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
15	1990	STEWART SYNDICATES LIMITED
15	1993	STEWART SYNDICATES LIMITED
17	1990	STEWART SYNDICATES LIMITED
17	1993	STEWART SYNDICATES LIMITED
26	1993	UNKNOWN
28	1993	MURRAY LAWRENCE & PARTNERS LIMITED
31	1990	MURRAY LAWRENCE & PARTNERS LIMITED
31	1991	MURRAY LAWRENCE & PARTNERS LIMITED
33	1993	HISCOX SYNDICATES LIMITED
34	1989	BANKSIDE SYNDICATES LIMITED
37	1993	STURGE MOTOR SYNDICATE MANAGEMENT LIMITED
40	1993	MURRAY LAWRENCE & PARTNERS LIMITED
42	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
43	1983	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
43	1984	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
43	1985	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
44	1993	ARCHER MANAGING AGENTS LIMITED
45	1993	BANKSIDE SYNDICATES LIMITED
47	1992	METHUEN (LLOYD’S UNDERWRITING AGENTS) LIMITED
48	1992	METHUEN (LLOYD’S UNDERWRITING AGENTS) LIMITED
51	1993	WELLINGTON UNDERWRITING AGENCIES LIMITED
52	1990	HISCOX SYNDICATES LIMITED
52	1991	HISCOX SYNDICATES LIMITED
52	1993	HISCOX SYNDICATES LIMITED
53	1992	CROWE SYNDICATE MANAGEMENT LTD.
55	1992	DUNCANSON AND HOLT SYNDICATE MANAGEMENT LTD.
56	1990	HIGHGATE MANAGING AGENCIES LTD.

56	1991	HIGHGATE MANAGING AGENCIES LTD.
56	1992	HIGHGATE MANAGING AGENCIES LTD.
58	1993	[blank in version used]
62	1993	MARLBOROUGH UNDERWRITING AGENCY LTD.
65	1990	HIGHGATE MANAGING AGENCIES LTD.
65	1991	HIGHGATE MANAGING AGENCIES LTD.
65	1992	HIGHGATE MANAGING AGENCIES LTD.
79	1993	JANSON GREEN LTD,
80	1988	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
80	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
80	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
86	1966	WHITTINGTON SYNDICATE MANAGEMENT LTD.
87	1990	CLAREMOUNT UNDERWRITING AGENCY LTD.
89	1982	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
90	1982	WHITTINGTON SYNDICATE MANAGEMENT LTD.
90	1990	WHITTINGTON SYNDICATE MANAGEMENT LTD.
93	1993	WREN SYNDICATE MANAGEMENT LTD.
97	1990	WELLINGTON UNDERWRITING AGENCIES LIMITED
97	1993	WELLINGTON UNDERWRITING AGENCIES LIMITED
102	1993	GAMMELL KERSHAW & COMPANY LTD.
103	1991	P & B (RUN-OFF) LIMITED
103	1992	P & B (RUN-OFF) LIMITED
104	1990	P & B (RUN-OFF) LIMITED
104	1991	P & B (RUN-OFF) LIMITED
105	1985	P & B (RUN-OFF) LIMITED
108	1986	P & B (RUN-OFF) LIMITED
108	1990	P & B (RUN-OFF) LIMITED
108	1991	P & B (RUN-OFF) LIMITED
109	1990	P & B (RUN-OFF) LIMITED
109	1991	P & B (RUN-OFF) LIMITED
112	1991	C.I. de ROUEMENT & CO LTD
112	1993	C.I. de ROUEMENT & CO LTD
113	1990	C.I. de ROUEMENT & CO LTD
113	1991	C.I. de ROUEMENT & CO LTD
122	1990	STURGE NON-MARINE SYNDICATE MANAGEMENT LTD.
122	1992	STURGE NON-MARINE SYNDICATE MANAGEMENT LTD.
123	1990	R.J. KILN & CO. LIMITED
123	1992	R.J. KILN & CO. LIMITED
125	1986	QBE UNDERWRITING AGENCY LTD
126	1980	ALEXANDER SYNDICATE MANAGEMENT LIMITED
126	1981	ALEXANDER SYNDICATE MANAGEMENT LIMITED
126	1982	ALEXANDER SYNDICATE MANAGEMENT LIMITED
134	1983	SENTINEL RUN-OFF LIMITED
134	1984	SENTINEL RUN-OFF LIMITED
134	1985	SENTINEL RUN-OFF LIMITED
134	1986	SENTINEL RUN-OFF LIMITED
134	1987	SENTINEL RUN-OFF LIMITED
134	1988	SENTINEL RUN-OFF LIMITED
138	1993	R.F. BAILEY (UNDERWRITING AGENCIES) LTD.
144	1990	JOHNSON HEATH LTD.
144	1991	JOHNSON HEATH LTD.
144	1992	JOHNSON HEATH LTD.
150	1968	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
151	1968	SYNDICATE UNDERWRITING MANAGEMENT LIMITED

153	1990	STURGE NON-MARINE SYNDICATE MANAGEMENT LTD
162	1984	TURRET RUN-OFF SERVICES LIMITED
162	1988	TURRET RUN-OFF SERVICES LIMITED
162	1989	TURRET RUN-OFF SERVICES LIMITED
162	1990	TURRET RUN-OFF SERVICES LIMITED
162	1991	TURRET RUN-OFF SERVICES LIMITED
164	1986	G.W. RUN-OFF
164	1989	G.W. RUN-OFF
164	1990	G.W. RUN-OFF
164	1991	G.W. RUN-OFF
165	1968	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
168	1982	CCGH AGENCY
168	1983	CCGH AGENCY
172	1993	STEWART SYNDICATES LIMITED
176	1980	<i>[blank in version used]</i>
179	1992	CATLIN UNDERWRITING AGENCIES LIMITED
183	1993	ASHLEY PALMER SYNDICATES LTD
184	1983	SENTINEL RUN-OFF LIMITED
184	1984	SENTINEL RUN-OFF LIMITED
184	1985	SENTINEL RUN-OFF LIMITED
184	1986	SENTINEL RUN-OFF LIMITED
184	1987	SENTINEL RUN-OFF LIMITED
184	1988	SENTINEL RUN-OFF LIMITED
185	1990	CLAREMOUNT UNDERWRITING AGENCY LIMITED
190	1989	WHITTINGTON SYNDICATE MANAGEMENT LTD
190	1990	WHITTINGTON SYNDICATE MANAGEMENT LTD
190	1991	WHITTINGTON SYNDICATE MANAGEMENT LTD
190	1995	LIBERTY SYNDICATE MANAGEMENT LIMITED
202	1989	CUTHBERT HEATH UNDERWRITING LIMITED
202	1990	CUTHBERT HEATH UNDERWRITING LIMITED
203	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
203	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
203	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
204	1993	STURGE NON-MARINE SYNDICATE MANAGEMENT LTD
205	1993	JAGO MANAGING AGENCY LTD
206	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
206	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
206	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
207	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
207	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
209	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
209	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
209	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
210	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
210	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
210	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
212	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
212	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
212	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
216	1989	TURRET RUN-OFF SERVICES LIMITED
216	1990	TURRET RUN-OFF SERVICES LIMITED
216	1991	TURRET RUN-OFF SERVICES LIMITED
218	1993	CHRISTOPHERSON HEATH LTD

219	1990	STURGE NON-MARINE SYNDICATE MANAGEMENT LTD
219	1993	STURGE NON-MARINE SYNDICATE MANAGEMENT LTD
225	1990	CATER ALLEN SYNDICATE MANAGEMENT LTD.
225	1991	CATER ALLEN SYNDICATE MANAGEMENT LTD.
225	1992	CATER ALLEN SYNDICATE MANAGEMENT LTD.
227	1993	GRAVETT & TILLING (UNDERWRITING AGENCIES)
228	1991	COTESWORTH & CO LIMITED
228	1993	COTESWORTH & CO LIMITED
234	1993	MARCHANT & KEIT UNDERWRITING LTD
235	1989	TURRET RUN-OFF SERVICES LIMITED
235	1991	TURRET RUN-OFF SERVICES LIMITED
235	1992	TURRET RUN-OFF SERVICES LIMITED
240	1991	ARCHER MANAGING AGENTS LIMITED
240	1992	ARCHER MANAGING AGENTS LIMITED
242	1991	TURRET RUN-OFF SERVICES LIMITED
250	1993	WREN SYNDICATES MANAGEMENT LTD
253	1993	BROCKBANK PERSONAL LINES LIMITED
254	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
254	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
255	1988	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
255	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
255	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
255	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
256	1991	TURRET RUN-OFF SERVICES LIMITED
256	1992	TURRET RUN-OFF SERVICES LIMITED
257	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
257	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
257	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
260	1993	K.G.M. UNDERWRITING AGENCIES LIMITED
263	1990	WELLINGTON UNDERWRITING AGENCIES LIMITED
264	1990	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
264	1991	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
264	1992	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
268	1989	SENTINEL RUN-OFF LIMITED
268	1990	SENTINEL RUN-OFF LIMITED
270	1993	ARCHER MANAGING AGENTS LIMITED
271	1993	CLAREMOUNT UNDERWRITING AGENCY LIMITED
272	1989	STERLING UNDERWRITING AGENCIES LIMITED
272	1990	STERLING UNDERWRITING AGENCIES LIMITED
275	1981	J.H. CHAPPELL (UNDERWRITING AGENCIES) LIMITED
282	1990	MARCHANT & ELIOT UNDERWRITING LTD
282	1991	MARCHANT & ELIOT UNDERWRITING LTD
282	1993	MARCHANT & ELIOT UNDERWRITING LTD
287	1990	P & B (RUN-OFF) LIMITED
287	1991	P & B (RUN-OFF) LIMITED
287	1992	P & B (RUN-OFF) LIMITED
288	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
288	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
288	1992	<i>[blank in version used]</i>
290	1989	G. W. RUN OFF
290	1990	G. W. RUN OFF
290	1991	G. W. RUN OFF
293	1993	STURGE NON-MARINE SYNDICATE MANAGEMENT LTD

295	1989	G. W. RUN OFF
295	1990	G. W. RUN OFF
295	1991	G. W. RUN OFF
296	1989	G. W. RUN OFF
296	1990	G. W. RUN OFF
296	1991	G. W. RUN OFF
298	1989	G. W. RUN OFF
298	1990	G. W. RUN OFF
298	1991	G. W. RUN OFF
299	1989	G. W. RUN OFF
299	1990	G. W. RUN OFF
299	1991	G. W. RUN OFF
304	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
304	1990	G. W. RUN OFF
305	1990	HISCOX SYNDICATES LIMITED
305	1991	HISCOX SYNDICATES LIMITED
308	1993	R.J. KILN & CO. LIMITED
309	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
309	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
309	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
309	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
310	1990	BANKSIDE SYNDICATES LIMITED
310	1991	BANKSIDE SYNDICATES LIMITED
310	1992	BANKSIDE SYNDICATES LIMITED
312	1991	WHITTINGTON SYNDICATE MANAGEMENT LTD
314	1993	ASHLEY PALMER SYNDICATES LTD
317	1982	WHITTINGTON SYNDICATE MANAGEMENT LTD
317	1990	WHITTINGTON SYNDICATE MANAGEMENT LTD
317	1991	WHITTINGTON SYNDICATE MANAGEMENT LTD
317	1992	WHITTINGTON SYNDICATE MANAGEMENT LTD
318	1993	BANKSIDE SYNDICATES LIMITED
319	1982	BANKSIDE SYNDICATES LIMITED
321	1989	WHITTINGTON SYNDICATE MANAGEMENT LTD
321	1990	WHITTINGTON SYNDICATE MANAGEMENT LTD
321	1991	WHITTINGTON SYNDICATE MANAGEMENT LTD
322	1990	CATER ALLEN SYNDICATE MANAGEMENT LIMITED
322	1993	CATER ALLEN SYNDICATE MANAGEMENT LIMITED
323	1991	MARCHANT & ELIOT UNDERWRITING LTD
323	1992	MARCHANT & ELIOT UNDERWRITING LTD
329	1985	O.S.M. LIMITED
329	1993	O.S.M. LIMITED
330	1993	STURGE MOTOR SYNDICATE MANAGEMENT LTD
331	1990	WHITTINGTON SYNDICATE MANAGEMENT LTD
331	1991	WHITTINGTON SYNDICATE MANAGEMENT LTD
332	1992	WELLINGTON UNDERWRITING AGENCIES LIMITED
334	1985	WHITTINGTON (MERRETT) SYNDICATE MANAGEMENT LTD
334	1990	WHITTINGTON (MERRETT) SYNDICATE MANAGEMENT LTD
340	1993	GRAVETT & TILLING (UNDERWRITING AGENCIES) LTD.
342	1984	BANKSIDE SYNDICATES LIMITED
342	1986	BANKSIDE SYNDICATES LIMITED
342	1991	BANKSIDE SYNDICATES LIMITED
342	1992	BANKSIDE SYNDICATES LIMITED
345	1981	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
345	1982	SYNDICATE UNDERWRITING MANAGEMENT LIMITED

345	1983	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
349	1990	CROWE SYNDICATE MANAGEMENT LTD
349	1991	CROWE SYNDICATE MANAGEMENT LTD
349	1992	CROWE SYNDICATE MANAGEMENT LTD
350	1993	ACTIVE SYNDICATE MANAGEMENT LTD
362	1992	MURRAY LAWRENCE & PARTNERS LIMITED
363	1989	CATER ALLEN SYNDICATE MANAGEMENT LTD
363	1990	CATER ALLEN SYNDICATE MANAGEMENT LTD
363	1991	CATER ALLEN SYNDICATE MANAGEMENT LTD
366	1992	STURGE MOTOR SYNDICATE MANAGEMENT LTD
367	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
367	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
367	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
370	1990	CLAREMOUNT UNDERWRITING AGENCY LIMITED
370	1991	CLAREMOUNT UNDERWRITING AGENCY LIMITED
370	1992	CLAREMOUNT UNDERWRITING AGENCY LIMITED
375	1989	METHUEN (LLOYD'S UNDERWRITING AGENTS) LIMITED
375	1990	METHUEN (LLOYD'S UNDERWRITING AGENTS) LIMITED
375	1993	METHUEN (LLOYD'S UNDERWRITING AGENTS) LIMITED
376	1993	VENTON UNDERWRITING AGENCIES LIMITED
382	1993	HARDY (UNDERWRITING AGENCIES) LTD.
384	1985	EVERSURE UNDERWRITING AGENCY LTD.
384	1989	EVERSURE UNDERWRITING AGENCY LTD.
384	1990	EVERSURE UNDERWRITING AGENCY LTD.
384	1991	EVERSURE UNDERWRITING AGENCY LTD.
386	1993	JANSON GREEN LTD.
387	1983	G. W. RUN OFF
387	1984	G. W. RUN OFF
387	1985	G. W. RUN OFF
387	1986	G. W. RUN OFF
387	1987	G. W. RUN OFF
387	1988	G. W. RUN OFF
387	1989	G. W. RUN OFF
388	1993	WREN SYNDICATES MANAGEMENT LTD
389	1993	WREN SYNDICATES MANAGEMENT LTD
393	1974	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
396	1993	STEWART SYNDICATES LIMITED
401	1990	CUTHBERT HEATH UNDERWRITING LIMITED
401	1991	CUTHBERT HEATH UNDERWRITING LIMITED
404	1989	CUTHBERT HEATH UNDERWRITING LIMITED
404	1990	CUTHBERT HEATH UNDERWRITING LIMITED
404	1991	CUTHBERT HEATH UNDERWRITING LIMITED
404	1992	CUTHBERT HEATH UNDERWRITING LIMITED
406	1990	WELLINGTON UNDERWRITING AGENCIES LIMITED
406	1993	WELLINGTON UNDERWRITING AGENCIES LIMITED
411	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
418	1985	WHITTINGTON SYNDICATE MANAGEMENT LTD.
418	1990	WHITTINGTON SYNDICATE MANAGEMENT LTD.
418	1991	WHITTINGTON SYNDICATE MANAGEMENT LTD.
418	1992	WHITTINGTON SYNDICATE MANAGEMENT LTD.
420	1982	VANGUARD UNDERWRITING AGENCIES LIMITED
421	1983	WHITTINGTON SYNDICATE MANAGEMENT LTD.
421	1990	WHITTINGTON SYNDICATE MANAGEMENT LTD.

423	1981	CCGH AGENCY
423	1982	CCGH AGENCY
423	1983	CCGH AGENCY
428	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
428	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
428	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
429	1993	STURGE NON-MARINE SYNDICATE MANAGEMENT LTD.
431	1993	WREN SYNDICATES MANAGEMENT LTD
433	1966	WHITTINGTON SYNDICATE MANAGEMENT LTD.
435	1993	D.P.MANN UNDERWRITING AGENCY LIMITED
437	1989	CUTHBERT HEATH UNDERWRITING LIMITED
437	1990	CUTHBERT HEATH UNDERWRITING LIMITED
439	1993	WELLINGTON UNDERWRITING AGENCIES LIMITED
445	1991	METHUEN (LLOYD'S UNDERWRITING AGENTS) LIMITED
445	1992	METHUEN (LLOYD'S UNDERWRITING AGENTS) LIMITED
448	1989	WELLINGTON UNDERWRITING AGENCIES LIMITED
448	1992	WELLINGTON UNDERWRITING AGENCIES LIMITED
451	1990	HOLMAN MANAGED SYNDICATES LIMITED
455	1989	P & B RUN-OFF LIMITED
455	1990	P & B RUN-OFF LIMITED
455	1991	P & B RUN-OFF LIMITED
456	1990	BANKSIDE SYNDICATES LIMITED
456	1991	BANKSIDE SYNDICATES LIMITED
456	1993	BANKSIDE SYNDICATES LIMITED
457	1993	STEWART SYNDICATES LIMITED
458	1983	WHITTINGTON SYNDICATE MANAGEMENT LTD.
463	1993	ARCHER MANAGING AGENTS LIMITED
464	1989	WHITTINGTON SYNDICATE MANAGEMENT LTD.
464	1990	WHITTINGTON SYNDICATE MANAGEMENT LTD.
464	1991	WHITTINGTON SYNDICATE MANAGEMENT LTD.
469	1981	CHARMAN UNDERWRITING AGENCIES LTD
469	1991	CHARMAN UNDERWRITING AGENCIES LTD
469	1992	CHARMAN UNDERWRITING AGENCIES LTD
471	1982	SYNDICATE MANAGEMENT (RUN-OFF) LIMITED
471	1983	SYNDICATE MANAGEMENT (RUN-OFF) LIMITED
471	1984	SYNDICATE MANAGEMENT (RUN-OFF) LIMITED
471	1990	SYNDICATE MANAGEMENT (RUN-OFF) LIMITED
475	1989	P & B (RUN-OFF) LIMITED
475	1990	P & B (RUN-OFF) LIMITED
475	1991	P & B (RUN-OFF) LIMITED
478	1990	HOLMAN MANAGED SYNDICATES LIMITED
478	1991	HOLMAN MANAGED SYNDICATES LIMITED
479	1976	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
483	1991	METHUEN (LLOYD'S UNDERWRITING AGENTS) LIMITED
483	1993	METHUEN (LLOYD'S UNDERWRITING AGENTS) LIMITED
484	1992	METHUEN (LLOYD'S UNDERWRITING AGENTS) LIMITED
488	1993	CHARMAN UNDERWRITING AGENCIES LTD
490	1993	RGB UNDERWRITING AGENCIES LTD
496	1988	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
498	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
498	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
500	1993	VANGUARD UNDERWRITING AGENCIES LIMITED
503	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED

503	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
505	1989	TURRET RUN-OFF SERVICES LIMITED
506	1989	CLAREMOUNT UNDERWRITING AGENCY LIMITED
506	1993	CLAREMOUNT UNDERWRITING AGENCY LIMITED
508	1993	O.S.M. LIMITED
509	1989	CLAREMOUNT UNDERWRITING AGENCY LIMITED
509	1990	CLAREMOUNT UNDERWRITING AGENCY LIMITED
509	1991	CLAREMOUNT UNDERWRITING AGENCY LIMITED
510	1991	R.J. KILN & CO. LIMITED
510	1993	R.J. KILN & CO. LIMITED
512	1992	TURRET RUN-OFF SERVICES LIMITED
518	1985	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
521	1991	P & B (RUN-OFF) LIMITED
521	1992	P & B (RUN-OFF) LIMITED
522	1990	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
527	1989	TURRET RUN-OFF SERVICES LIMITED
527	1990	TURRET RUN-OFF SERVICES LIMITED
529	1992	STERLING UNDERWRITING AGENCIES LIMITED
534	1977	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
535	1993	COTESWORTH & CO LIMITED
536	1993	COTESWORTH & CO LIMITED
540	1987	ADDITIONAL UNDERWRITING AGENCIES (NO.7) LTD.
540	1988	ADDITIONAL UNDERWRITING AGENCIES (NO.7) LTD.
540	1989	ADDITIONAL UNDERWRITING AGENCIES (NO.7) LTD.
540	1990	ADDITIONAL UNDERWRITING AGENCIES (NO.7) LTD.
544	1991	ARCHER MANAGING AGENTS LIMITED
544	1993	ARCHER MANAGING AGENTS LIMITED
545	1993	STURGE AVIATION SYNDICATE MANAGEMENT LTD
546	1993	STURGE NON-MARINE SYNDICATE MANAGEMENT LTD
551	1982	CCGH AGENCY
551	1983	CCGH AGENCY
552	1990	MANDER, THOMAS & COOPER (UNDERWRITING AGENCIES) LIMITED
552	1993	MANDER, THOMAS & COOPER (UNDERWRITING AGENCIES) LIMITED
553	1984	C.J.W. (UNDERWRITING AGENCIES) LTD
553	1985	CENTREWRITE
553	1987	CENTREWRITE
554	1993	EVERSURE UNDERWRITING AGENCY LTD.
555	1970	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
557	1991	R.J. KILN & CO. LIMITED
557	1993	R.J. KILN & CO. LIMITED
560	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
561	1992	BANKSIDE SYNDICATES LIMITED
566	1993	BANKSIDE SYNDICATES LIMITED
570	1993	M.H. COCKELL & PARTNERS
573	1990	CATER ALLEN SYNDICATE MANAGEMENT LTD
573	1991	CATER ALLEN SYNDICATE MANAGEMENT LTD
573	1992	CATER ALLEN SYNDICATE MANAGEMENT LTD
575	1992	J.H. CHAPPELL (UNDERWRITING AGENCIES) LIMITED
577	1991	A.R. MOUNTAIN & SON LTD.
577	1992	A.R. MOUNTAIN & SON LTD.
580	1991	CUTHBERT HEATH UNDERWRITING LIMITED

582	1992	CASSIDY DAVIS UNDERWRITING LTD
584	1983	BANKSIDE SYNDICATES LIMITED
584	1990	BANKSIDE SYNDICATES LIMITED
584	1991	BANKSIDE SYNDICATES LIMITED
584	1992	BANKSIDE SYNDICATES LIMITED
587	1993	STEWART SYNDICATES LIMITED
588	1993	BROCKBANK SYNDICATE MANAGEMENT LTD
590	1990	L.G. COX & CO. LTD.
590	1993	L.G. COX & CO. LTD.
598	1989	TURRET RUN-OFF SERVICES LIMITED
598	1990	TURRET RUN-OFF SERVICES LIMITED
601	1990	MARLBOROUGH UNDERWRITING AGENCY LIMITED
601	1991	MARLBOROUGH UNDERWRITING AGENCY LIMITED
602	1988	HOLMAN MANAGED SYNDICATES LIMITED
602	1989	HOLMAN MANAGED SYNDICATES LIMITED
602	1990	HOLMAN MANAGED SYNDICATES LIMITED
602	1991	HOLMAN MANAGED SYNDICATES LIMITED
603	1993	R.J. KILN & CO. LIMITED
604	1984	CUTHBERT HEATH UNDERWRITING LIMITED
604	1989	CUTHBERT HEATH UNDERWRITING LIMITED
604	1990	CUTHBERT HEATH UNDERWRITING LIMITED
604	1991	CUTHBERT HEATH UNDERWRITING LIMITED
609	1993	ATRIUM UNDERWRITING LIMITED
613	1990	TURRET RUN-OFF SERVICES LIMITED
613	1991	TURRET RUN-OFF SERVICES LIMITED
613	1992	TURRET RUN-OFF SERVICES LIMITED
623	1993	BEAZLEY FURLONGE LTD.
624	1993	HISCOX SYNDICATES LIMITED
625	1993	HISCOX SYNDICATES LIMITED
633	1990	MARLBOROUGH UNDERWRITING AGENCY LIMITED
633	1991	MARLBOROUGH UNDERWRITING AGENCY LIMITED
633	1993	MARLBOROUGH UNDERWRITING AGENCY LIMITED
635	1991	MARLBOROUGH UNDERWRITING AGENCY LIMITED
635	1992	MARLBOROUGH UNDERWRITING AGENCY LIMITED
636	1992	CATER ALLEN SYNDICATE MANAGEMENT LTD
640	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
640	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
640	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
640	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
648	1991	MURRAY LAWRENCE & PARTNERS LIMITED
657	1993	ARCHER MANAGING AGENTS LIMITED
658	1992	COX ENERGY AND MARINE LIMITED
660	1989	CATER ALLEN SYNDICATE MANAGEMENT LTD
660	1990	CATER ALLEN SYNDICATE MANAGEMENT LTD
662	1990	C.W. ROME (UNDERWRITING AGENCY) LTD
662	1991	C.W. ROME (UNDERWRITING AGENCY) LTD
662	1992	C.W. ROME (UNDERWRITING AGENCY) LTD
666	1989	SENTINEL RUN-OFF LIMITED
674	1990	CLAREMOUNT UNDERWRITING AGENCY LIMITED
674	1991	CLAREMOUNT UNDERWRITING AGENCY LIMITED
685	1989	HOLMAN MANAGED SYNDICATES LIMITED
687	1990	HOLMAN MANAGED SYNDICATES LIMITED
687	1991	HOLMAN MANAGED SYNDICATES LIMITED

687	1992	HOLMAN MANAGED SYNDICATES LIMITED
694	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
694	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
694	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
697	1990	TURRET RUN-OFF SERVICES LIMITED
697	1991	TURRET RUN-OFF SERVICES LIMITED
697	1992	TURRET RUN-OFF SERVICES LIMITED
700	1982	P & D MANAGING AGENCY LTD.
701	1982	P & D MANAGING AGENCY LTD.
702	1990	O.S.M. LIMITED
702	1993	O.S.M. LIMITED
707	1982	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
707	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
707	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
710	1991	TURRET RUN-OFF SERVICES LIMITED
710	1992	TURRET RUN-OFF SERVICES LIMITED
711	1991	P & B (RUN-OFF) LIMITED
711	1992	P & B (RUN-OFF) LIMITED
718	1993	OWEN & WILBY UNDERWRITING AGENCY LIMITED
724	1992	QBE UNDERWRITING AGENCY LTD.
725	1988	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
725	1989	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
725	1990	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
727	1989	S.A. MEACOCK & COMPANY
727	1993	S.A. MEACOCK & COMPANY
731	1991	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
731	1992	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
732	1993	C.I. de ROUEMENT & CO LIMITED
733	1990	P & B (RUN-OFF) LIMITED
733	1991	P & B (RUN-OFF) LIMITED
734	1990	L.G. COX & CO. LTD.
734	1993	L.G. COX & CO. LTD.
735	1993	WREN SYNDICATES MANAGEMENT LTD.
740	1990	EVERSURE UNDERWRITING AGENCY LTD.
740	1991	EVERSURE UNDERWRITING AGENCY LTD.
740	1992	EVERSURE UNDERWRITING AGENCY LTD.
741	1990	ARCHER MANAGING AGENCY LTD.
741	1993	ARCHER MANAGING AGENCY LTD.
744	1991	MARLBOROUGH UNDERWRITING AGENCY LIMITED
744	1993	MARLBOROUGH UNDERWRITING AGENCY LIMITED
745	1990	KPH UNDERWRITING AGENCIES LIMITED
745	1991	KPH UNDERWRITING AGENCIES LIMITED
745	1992	KPH UNDERWRITING AGENCIES LIMITED
749	1983	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
750	1979	UNKNOWN
762	1976	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
762	1977	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
762	1978	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
764	1990	CHARMAN UNDERWRITING AGENCIES LTD
764	1991	CHARMAN UNDERWRITING AGENCIES LTD
765	1991	R.J.KILN & CO. LIMITED
765	1993	R.J.KILN & CO. LIMITED
767	1991	R & B (RUN-OFF) LIMITED

767	1992	R & B (RUN-OFF) LIMITED
779	1993	CASSIDY DAVIS UNDERWRITING LTD.
780	1993	B.F. CAUDLE AGENCIES LTD.
782	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
782	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
782	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
783	1974	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
785	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
785	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
785	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
787	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
787	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
787	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
794	1990	TURRET RUN-OFF SERVICES LIMITED
794	1991	TURRET RUN-OFF SERVICES LIMITED
794	1992	TURRET RUN-OFF SERVICES LIMITED
800	1993	WREN SYNDICATES MANAGEMENT LTD
802	1985	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
803	1990	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
803	1991	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
803	1992	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
804	1989	HOLMAN MANAGED SYNDICATES LIMITED
807	1991	R.J. KILN & CO. LIMITED
807	1993	R.J. KILN & CO. LIMITED
808	1992	EVERSURE UNDERWRITING AGENCY LTD.
820	1993	MURRAY LAWRENCE & PARTNERS LIMITED
824	1991	MURRAY LAWRENCE & PARTNERS LIMITED
824	1993	MURRAY LAWRENCE & PARTNERS LIMITED
825	1993	MURRAY LAWRENCE & PARTNERS LIMITED
831	1991	TURRET RUN-OFF SERVICES LIMITED
833	1989	TURRET RUN-OFF SERVICES LIMITED
833	1990	TURRET RUN-OFF SERVICES LIMITED
833	1991	TURRET RUN-OFF SERVICES LIMITED
836	1990	TURRET RUN-OFF SERVICES LIMITED
836	1991	TURRET RUN-OFF SERVICES LIMITED
836	1992	TURRET RUN-OFF SERVICES LIMITED
838	1965	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
839	1992	ARCHER MANAGING AGENTS LIMITED
843	1988	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
843	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
843	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
843	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
847	1987	ADDITIONAL UNDERWRITING AGENCIES (NO.7) LTD.
847	1988	ADDITIONAL UNDERWRITING AGENCIES (NO.7) LTD.
847	1989	ADDITIONAL UNDERWRITING AGENCIES (NO.7) LTD.
847	1990	ADDITIONAL UNDERWRITING AGENCIES (NO.7) LTD.
851	1991	COTESWORTH & CO. LIMITED
852	1992	MURRAY LAWRENCE & PARTNERS LIMITED
855	1990	A.R. MOUNTAIN & SON LTD.
855	1991	A.R. MOUNTAIN & SON LTD.
855	1992	A.R. MOUNTAIN & SON LTD.
860	1984	HOLMAN MANAGED SYNDICATES LIMITED
860	1992	HOLMAN MANAGED SYNDICATES LIMITED

861	1993	BROCKBANK SYNDICATE MANAGEMENT LTD
862	1980	CCGH AGENCY
862	1981	CCGH AGENCY
862	1982	CCGH AGENCY
862	1983	CCGH AGENCY
866	1993	ARCHER MANAGING AGENTS LIMITED
868	1989	TURRET RUN-OFF SERVICES LIMITED
868	1990	TURRET RUN-OFF SERVICES LIMITED
868	1991	TURRET RUN-OFF SERVICES LIMITED
870	1968	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
871	1977	UNKNOWN
872	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
872	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
872	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
877	1993	BASTES CUNNINGHAM UNDERWRITING LIMITED
887	1993	MURRAY LAWRENCE & PARTNERS LIMITED
892	1993	ACTIVE SYNDICATE MANAGEMENT LTD
895	1980	SYNDICATE 895 (RUN OFF) LTD.
895	1981	SYNDICATE 895 (RUN OFF) LTD.
895	1982	SYNDICATE 895 (RUN OFF) LTD.
896	1990	COTESWORTH & CO. LIMITED
896	1993	COTESWORTH & CO. LIMITED
897	1993	STURGE MOTOR SYNDICATE MANAGEMENT LTD.
901	1985	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
901	1986	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
901	1987	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
901	1988	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
901	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
902	1993	P.B. COFFEY (UNDERWRITING AGENCY) LTD
913	1993	MURRAY LAWRENCE & PARTNERS LIMITED
917	1983	A.R. MOUNTAIN & SON LTD.
917	1984	A.R. MOUNTAIN & SON LTD.
917	1985	A.R. MOUNTAIN & SON LTD.
917	1986	A.R. MOUNTAIN & SON LTD.
919	1992	MURRAY LAWRENCE & PARTNERS LIMITED
920	1993	MURRAY LAWRENCE & PARTNERS LIMITED
923	1992	ARCHER MANAGING AGENTS LIMITED
925	1993	STURGE AVIATION SYNDICATE MANAGEMENT LTD
927	1984	SENTINEL RUN-OFF LIMITED
927	1990	SENTINEL RUN-OFF LIMITED
929	1991	SENTINEL RUN-OFF LIMITED
929	1992	SENTINEL RUN-OFF LIMITED
932	1989	JANSON GREEN LTD
936	1989	JANSON GREEN LTD
939	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
939	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
939	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
942	1991	CUTHBERT HEATH UNDERWRITING LIMITED
942	1992	CUTHBERT HEATH UNDERWRITING LIMITED
945	1982	TURRET RUN-OFF SERVICES LIMITED
945	1984	TURRET RUN-OFF SERVICES LIMITED
947	1992	ARCHER MANAGING AGENTS LIMITED
950	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED

950	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
950	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
952	1993	ARCHER MANAGING AGENTS LIMITED
955	1991	R.J. KILN & CO. LIMITED
955	1993	R.J. KILN & CO. LIMITED
957	1993	DUNCANSON AND HOLT SYNDICATE MANAGEMENT LTD.
958	1993	G.S. CHRISTENSEN AND PARTNERS
959	1993	O.S.M. LIMITED
960	1993	STURGE AVIATION SYNDICATE MANAGEMENT LTD
962	1993	ACTIVE SYNDICATE MANAGEMENT LTD
963	1993	CROWE SYNDICATE MANAGEMENT LTD
964	1978	UNKNOWN
965	1989	CUTHBERT HEATH UNDERWRITING LIMITED
965	1990	CUTHBERT HEATH UNDERWRITING LIMITED
965	1991	CUTHBERT HEATH UNDERWRITING LIMITED
965	1992	CUTHBERT HEATH UNDERWRITING LIMITED
975	1983	CUTHBERT HEATH UNDERWRITING LIMITED
975	1986	CUTHBERT HEATH UNDERWRITING LIMITED
979	1993	SERVICE MANAGING AGENCY LIMITED
980	1993	BANKSIDE SYNDICATES LIMITED
982	1993	CROWE SYNDICATE MANAGEMENT LTD
990	1993	MORGAN, FENTIMAN AND BARBER
991	1993	A.E. GRANT (UNDERWRITING AGENCIES) LTD
992	1979	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
994	1992	ARCHER MANAGING AGENTS LIMITED
998	1993	STURGE AVIATION SYNDICATE MANAGEMENT LTD
1002	1990	TURRET RUN-OFF SERVICES LIMITED
1002	1991	TURRET RUN-OFF SERVICES LIMITED
1002	1992	TURRET RUN-OFF SERVICES LIMITED
1003	1993	CATLIN UNDERWRITING AGENCIES LIMITED
1005	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1005	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1006	1991	DUNCANSON AND HOLT SYNDICATE MANAGEMENT LTD
1006	1992	DUNCANSON AND HOLT SYNDICATE MANAGEMENT LTD
1007	1993	SPRECKLEY VILLIERS BURNHOPE & CO. LTD
1009	1990	O.S.M. LIMITED
1009	1993	O.S.M. LIMITED
1011	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1011	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1011	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1014	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1014	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1019	1993	CLAREMOUNT UNDERWRITING AGENCY LIMITED
1021	1990	TURRET RUN-OFF SERVICES LIMITED
1021	1991	TURRET RUN-OFF SERVICES LIMITED
1023	1993	MANDER, THOMAS & COOPER (UNDERWRITING AGENCIES) LIMITED
1025	1990	L.R. SAWYER (UNDERWRITING) LIMITED
1025	1991	L.R. SAWYER (UNDERWRITING) LIMITED
1027	1993	COX NEWTON & HARMAN LTD
1028	1993	WELLINGTON UNDERWRITING AGENCIES LIMITED
1034	1991	HISCOX SYNDICATES LIMITED
1034	1992	HISCOX SYNDICATES LIMITED

1035	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1035	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1035	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1036	1993	BANKSIDE SYNDICATES LIMITED
1038	1993	VENTON UNDERWRITING AGENCIES LIMITED
1047	1992	MARLBOROUGH UNDERWRITING AGENCY LIMITED
1048	1991	A.R. MOUNTAIN & SON LTD
1048	1992	A.R. MOUNTAIN & SON LTD
1049	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1052	1991	RGB UNDERWRITING AGENCIES LTD
1053	1991	P & B (RUN-OFF) LIMITED
1053	1992	P & B (RUN-OFF) LIMITED
1058	1991	MURRAY LAWRENCE & PARTNERS LIMITED
1066	1990	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1066	1991	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1066	1992	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1067	1990	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1067	1991	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1067	1992	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1068	1990	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1068	1991	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1068	1992	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1069	1993	COTESWORTH & CO. LIMITED
1081	1990	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1081	1991	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1081	1992	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1083	1991	CUTHBERT HEATH UNDERWRITING LIMITED
1084	1993	STEWART SYNDICATES LIMITED
1085	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1085	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1086	1990	CUTHBERT HEATH UNDERWRITING LIMITED
1086	1991	CUTHBERT HEATH UNDERWRITING LIMITED
1086	1992	CUTHBERT HEATH UNDERWRITING LIMITED
1087	1993	ARCHER MANAGING AGENTS LIMITED
1088	1991	CATER ALLEN SYNDICATE MANAGEMENT LTD
1088	1992	CATER ALLEN SYNDICATE MANAGEMENT LTD
1091	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1093	1991	STERLING UNDERWRITING AGENCIES LIMITED
1093	1993	STERLING UNDERWRITING AGENCIES LIMITED
1095	1993	WELLINGTON UNDERWRITING AGENCIES LIMITED
1096	1993	STEWART SYNDICATES LIMITED
1097	1989	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1097	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1098	1990	POLWRING UNDERWRITING AGENCY LTD
1098	1991	POLWRING UNDERWRITING AGENCY LTD
1098	1992	POLWRING UNDERWRITING AGENCY LTD
1101	1993	TRAFALGAR UNDERWRITING AGENCIES LIMITED
1104	1990	WHITTINGTON SYNDICATE MANAGEMENT LTD
1104	1991	WHITTINGTON SYNDICATE MANAGEMENT LTD
1105	1993	R.J. KILN & CO. LIMITED
1112	1991	TURRET RUN-OFF SERVICES LIMITED
1112	1992	TURRET RUN-OFF SERVICES LIMITED
1114	1993	SENTINEL RUN-OFF LIMITED

1118	1990	TURRET RUN-OFF SERVICES LIMITED
1121	1993	CROWE SYNDICATE MANAGEMENT LTD
1122	1989	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1122	1990	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1122	1991	WHITTINGTON SYNDICATE MANAGEMENT LIMITED
1125	1990	TURRET RUN-OFF SERVICES LIMITED
1125	1991	TURRET RUN-OFF SERVICES LIMITED
1125	1992	TURRET RUN-OFF SERVICES LIMITED
1128	1990	BANKSIDE SYNDICATES LIMITED
1128	1991	BANKSIDE SYNDICATES LIMITED
1129	1990	MARLBOROUGH UNDERWRITING AGENCY LIMITED
1137	1989	TURRET RUN-OFF SERVICES LIMITED
1139	1990	HISCOX SYNDICATES LIMITED
1139	1991	HISCOX SYNDICATES LIMITED
1139	1992	HISCOX SYNDICATES LIMITED
1141	1993	J E MUMFORD (UNDERWRITING AGENCIES) LIMITED
1142	1992	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1143	1991	WEEDON UNDERWRITING AGENCIES LIMITED
1143	1992	WEEDON UNDERWRITING AGENCIES LIMITED
1144	1993	BATES CUNNINGHAM UNDERWRITING LIMITED
1145	1989	JANSON GREEN LTD
1145	1990	JANSON GREEN LTD
1145	1991	JANSON GREEN LTD
1145	1992	JANSON GREEN LTD
1148	1992	JANSON GREEN LTD
1152	1990	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1152	1991	SYNDICATE UNDERWRITING MANAGEMENT LIMITED
1153	1990	TURRET RUN-OFF SERVICES LIMITED
1153	1991	TURRET RUN-OFF SERVICES LIMITED
1153	1992	TURRET RUN-OFF SERVICES LIMITED
1156	1993	BANKSIDE SYNDICATES LIMITED
1157	1993	STEWART SYNDICATES LIMITED
1158	1990	HOLMAN MANAGED SYNDICATES LIMITED
1158	1991	HOLMAN MANAGED SYNDICATES LIMITED
1162	1991	P & B (RUN-OFF) LIMITED
1162	1992	P & B (RUN-OFF) LIMITED
1163	1991	TURRET RUN-OFF SERVICES LIMITED
1171	1993	RGB UNDERWRITING AGENCIES LTD
1173	1993	COTTRELL AND MAGUIRE LIMITED
1176	1993	COX NEWTON & HARMAN LTD
1178	1993	BATES CUNNINGHAM UNDERWRITING LIMITED
1179	1993	R.J. KILN & CO. LIMITED
1182	1991	COTESWORTH & CO. LIMITED
1182	1992	COTESWORTH & CO. LIMITED
1183	1995	VENTON UNDERWRITING AGENCIES LIMITED
1184	1993	WELLINGTON UNDERWRITING AGENCIES LIMITED
1191	1993	ASHLEY PALMER SYNDICATES LTD.
1192	1993	D.P. MANN UNDERWRITING AGENCY LIMITED
[blank or.]	9999	UNKNOWN
5001	1993	

SCHEDULE 2 — DEFINITIONS AND INTERPRETATION

1. In this Agreement of which this schedule 2 forms part the following expressions shall have the following meanings:

1992 and Prior Business means all liabilities under contracts of insurance underwritten at Lloyd's (other than life business) and originally allocated to the 1992 year of account or any earlier year of account including, without limitation, any such liabilities reinsured to close into the 1993 or any later year of account but excluding any liabilities re-signed, or re-allocated pursuant to a premium transfer, into the 1993 or any later year;

NOTE: For RRC 4 use, see *ibid.*, recital (E), (F), §§2.1(c), 3.3, 5.1(d), 5.2(c), 6.13, 6.16(b), 6.17, 13, 15.3 proviso, 17(b), 25.1; *ibid.*, Sch. 2, §1 definition of "Assumed Liabilities", "Books and Records", "Claim", "E&O Companies Reinsurance", "Equitas Scheme", "Finality Statement", "Insurance Creditor", "Lioncover Reinsurance", "PSL Companies Reinsurance", "Reinsurance Obligations", "Retrocession Agreement", "Settlement Offer Document", "Syndicate Loan", "Syndicate Reinsurances", "US Trust Assets". The liabilities intended to be the subject of the definition are those allocated: (1) at the time that they were sold, to participants on YAs budding in the 1992 or prior UY; (2) as a result only of conventional outward-RTC, to participants on YAs budding in the 1993 UY or any later UY. SYA stamps' reinsurance products in relation to 1992 and prior business not EquitasRe-reinsured include (for example): (1) XL treaty reinsurance on a "losses occurring during" basis;¹ (2) premium or portfolio transfers which split up long term insurance contracts between various YAs of the same syndicate to overcome the one-year venture;² (3) 1992 and prior business outwardly reinsured by conventional insurance companies and then outwardly reinsured by SYA participants;³ (4) "claims made" policies allocated to 1993 and subsequent YAs covering risks related to events which occurred in 1992 or prior years;⁴ (5) whole account run-off policies written by 1993 and later YAs covering 1992 and prior business; (6) from 1986 onwards, certain reinsurance contracts containing roll-over "sunset" clauses.⁵

under contracts: more properly, "under all contracts".

contracts of insurance: correct: insurance policies and certificates are not themselves insurance contracts, but merely evidence of insurance contracts.

at Lloyd's: correct: insurance is sold at Lloyd's, not by Lloyd's.

originally allocated: the meaning of the phrase was considered in *Mander v Equitas Ltd.* [2000] Lloyd's Rep IR 520 (Morison J). Held: it meant allocated ((if at all) specifically by LPSO.⁶ If a liability had not been allocated by LPSO then Equitas Re was not obliged under RRC 4 to pay it.⁷

allocated to the 1992 year of account or any earlier year of account: infelicitous: the draftsman appears to intend to refer to allocation to a particular SYA stamp, in which case there is no such thing as "the" 1992 year of account.

reinsured to close into the 1993 or any later year of account: liabilities are not RTCed into "the" anything. In this case they are conventionally inward-RTCed by participants on SYAs budding in the 1993 or in a later UY.⁸

later year: Presumably an UY (rather than a YA or calendar year) is meant.

Accepting Name means a Name who has accepted or accepts the Settlement Offer in accordance with the terms set out in the Settlement Offer Document;

NOTE: For RRC 4 use, see *ibid.*, §§5.1(b), 5.6, 5.6(a), (b), 5.9, 6.16; *ibid.*, Sch. 2, §1 definition of "Settlement Agreement". RRC 1 also uses the term "Accepting Name" in the same context: see RRC 1, Sch. 1, §1. *Cf.* a refusenik.

Actual Insurance Creditor means any Insurance Creditor in respect of whom any Claim is outstanding;

NOTE: For RRC 4 use, see *ibid.*, Sch. 3, §13(a)-(d). *Cf.* Contingent Insurance Creditor.

¹ *SOD*, p.133-4.

² *SOD*, p.134.

³ *SOD*, p.134. "There is no ready means of identifying those liabilities as they come back into Lloyd's": *ibid.*

⁴ *SOD*, p.134.

⁵ *SOD*, p.134.

⁶ *Mander v Equitas Ltd.* [2000] Lloyd's Rep IR 520, 522-523 (Morison J).

⁷ *Mander v Equitas Ltd.* [2000] Lloyd's Rep IR 520, 523 (Morison J):-

[T]he allocation of business to a year of account is a technical operation with which the market is familiar ... What the contract [RRC 4] required was an "allocation". A line in the sand was drawn in relation to all business allocated to the 1992 or earlier years of account, but not to such business which, for some or another had not been so allocated.

⁸ And see *SOD*, p.123 ("Equitas will reinsure those Names who are ... on 1993 and later years of account ... who have re-insured 1992 and prior business to close, in respect of their liabilities relating to 1992 and prior business under that reinsurance to close contract"). See at RRC 4, Sch. 1 the list of SYAs whose participants were RTCed by Equitas Re.

Adjustment Entitlement means the right of a Reinsured Name, if there is a Trigger Event leading to an upward adjustment of a Retrocession Rate, to receive compensation in accordance with paragraph 13 of schedule 3;

NOTE: For RRC 4 use, see *ibid.*, Sch. 3, §3.1(ii).

“Reinsured Name”: not defined in RRC 4. Presumably error for “Name” (see similarly RRC 4’s no-definition use of ‘Reinsured Name’ at *ibid.*, Sch. 2, §1 definition of “Adjustment Entitlement”, “Proportionate Cover Declaration”, and “Proportionate Cover Plan”, and *ibid.*, Sch. 3, §12).

American Business shall have the meaning given in the EATD;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Proportionate Cover Rate”, “Relevant Available Assets”, “Relevant Original Liability”, “Relevant Reinsurance Indemnities”, “Residual Business”, “US Trust Rate”; *ibid.*, Sch. 3, §§5.1(b), 6.1, 6.1(b), (c). Cf. “American business” at LATD, §1.3

APH Claims means any Claim occasioned by asbestos, onshore pollution or any health hazard;

NOTE: For RRC 4 use, see *ibid.*, §13 heading, §13.

Assigned Property has the meaning ascribed to it in clause 4.1;

NOTE: For RRC 4 use, see *ibid.*, §§4.1, 4.2, 4.3, 4.4, 4.6, 4.8; *ibid.*, Sch. 2, §1 definition of “Declaration of Trust”. Cf. RRC 7, §1.1 “Trust Property”.

Assumed Liability means in relation to a Segregated Account any creditor or liability at the Effective Date properly included or which ought properly to have been included in the Segregated Account and all personal expenses arising between 31 December 1995 and the Effective Date and unpaid at the Effective Date in respect of Syndicate 1992 and Prior Business in each case, as shown in the relevant Completion Accounts;

NOTE: For RRC 4 use, see *ibid.*, Sch. 4, §1.6.

Auditor Settlement Fund means the fund of approximately £152 million offered to Names in accordance with the terms of the Settlement Offer Document;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Combined Litigation Settlement Funds”. Cf. RRC 4, Sch. 2, §1 definition of “Litigation Settlement Fund”.

Australian Business shall have the equivalent meaning to the term Australian Liabilities proposed to be given in the EAusCA;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Australian Rate”, “Proportionate Cover Rate”, “Relevant Available Assets”, “Relevant Original Liability”, “Relevant Reinsurance Indemnities”, “Residual Business”; *ibid.*, Sch. 3, §§3, 5.1(b), 6.1, 6.1(b), (c).

Australian Custody Assets means the aggregate of the assets in the EAusCA;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Australian Rate”, “Dedicated Assets”; *ibid.*, Sch. 3, §5.1(a).

Australian Rate means the rate at which the Australian Business may be discharged from the Australian Custody Assets alone;

NOTE: For RRC 4 use, see *ibid.*, Sch. 3, §§6.1(a)(iv), (b), (c), (d). Cf. the other RRC 4, Sch. 3, §6.1(a) rates.

Automatic Reinsurance Trigger Event has the meaning set out in paragraph 2.3 of schedule 3;

NOTE: For RRC 4 use, see *ibid.*, §3.5; *ibid.*, Sch. 2, §1 definition of “Reinsurance Trigger Event”; *ibid.*, §§2.3, 3.3, 10.1. Cf. Certified Reinsurance Trigger Event; Automatic Trigger Event; Certified Trigger Event.

Available Assets means the assets of ERL (including ERL’s rights under the Retrocession Agreement) as at the Record Date less the amount of the General Creditors as at the Record Date;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Non-Dedicated Available Assets”, “Original Liability”, “Proportionate Cover Rate”, “Record Date”, “Relevant Available Assets”, “Residual Business Rate”; *ibid.*, Sch. 3, §5.1(a). A Proportionate Cover Plan merely reduces relevant liabilities, not relevant assets.

Board of ERL means the board of directors of ERL;

NOTE: For RRC 4 use, see *ibid.*, recital (E), §§2.1(a), (c), (d); *ibid.*, Sch. 2, §1 definition of “Interim Proportionate Cover Declaration”; *ibid.*, Sch. 3, §§2.1(a), (b), 2.2, 2.3, 2.4, 6.3, 8.2, 14; *ibid.*, Sch. 5, §2 definition of “Annual Adjustment”; §§3.2, 5.

the board of directors of ERL: “board” has a wider meaning in Equitas Re’s Articles of Association.⁹

⁹ See Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 written members’ resolution), §3(b): “the word *board* in the context of the exercise of any power contained in these Articles includes any committee constituting of one or more directors, any director holding executive office and any local or divisional board, manager or

Books and Records means, in respect of each Syndicate and Closed Year Syndicate, all such information concerning the Syndicate 1992 and Prior Business of that Syndicate or Closed Year Syndicate and assets held in respect thereof including (without prejudice to the generality of the foregoing) policy slips, policy wordings, underwriting cards, certificates of insurance, policy renewal or cancellation documents, claims information (including print-outs of recorded claims provided by that Syndicate or Closed Year Syndicate or by Lloyd's Claims Office), reserving documentation, reinsurance information, facultative and treaty outwards reinsurance wordings, and all correspondence relating thereto and all books of account, financial information, investment records, accounting records and other records (however stored) prepared or maintained by or on behalf of that Syndicate or Closed Year Syndicate;

NOTE: For RRC 4 use, see *ibid.*, §§12.(a), (b), 15.1 heading, subheading, 15.1, 15.2, 15.3 heading, 15.3(a), (b).

provided by that Syndicate or Closed Year Syndicate: a syndicate properly defined does not provide anything. In the present context, the mutual managing agency of the participants on a particular SYA does the providing.

Broker means any body corporate or partnership which as at the date hereof is permitted to broke insurance business at Lloyd's by virtue of its registration under the Lloyd's Brokers Byelaw or by virtue of being a party to an umbrella arrangement registered under the Umbrella Arrangements Byelaw (No. 6 of 1988) and any partners, directors, officers and/or employees of such body corporate or partnership;

NOTE: For RRC 4 use, see *ibid.*, §§6.16, 6.16(b); *ibid.*, Sch. 2, §1 definition of "Broker's Claim", "Broker's Group". For "broker", see RRC 4, §§9.2(m), (o), 12. "Broker" means specifically a broker self-regulatorily permitted to broke business at Lloyd's.

Lloyd's Brokers Byelaw: viz., Byelaw 5 of 1988, now revoked.¹⁰

umbrella arrangement: umbrella arrangements (a.k.a. "piggybacks", "flags of convenience") are now obsolete.¹¹

Broker's Claim has the meaning set out in clause 6.16;

NOTE: the term is not used in RRC 4 as extracted. *Ibid.*, §6.16 uses "Brokers Claim". For RRC 4 use of "Brokers Claim", see *ibid.*, §§6.16, 6.16(a), (b).

Broker's Group means a Broker and any subsidiary or holding company (whether direct or indirect), or any other subsidiary of any such holding company, of a Broker from time to time, including any former holding company or subsidiary, and all past or present partners, directors, officers and/or employees from time to time of any of such companies or partnerships, but shall not include any current or former member of such group which is an insurance company which has issued policies or contracts of reinsurance or retrocession in favour of a Syndicate or Closed Year Syndicate;

NOTE: the term is not used in RRC 4 as extracted.

business day means any day other than a Saturday or Sunday on which banks are open for business in London;

NOTE: For RRC 4 use, see *ibid.*, §2.22; Sch. 2, §1 definition of "Effective Date".

Can\$ or Canadian Dollar means the lawful currency of Canada;

NOTE: For RRC 4 use of *Can\$*, see *ibid.*, §18. For *ibid.* use of *Canadian Dollar*, see *ibid.*, §18.

Canadian Business shall have the meaning give in the ECTD;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of "ECTF Rate", "Proportionate Cover Rate", "Relevant Available Assets", "Relevant Original Liability", "Relevant Reinsurance Indemnities", "Residual Business"; *ibid.*, Sch. 3, §§5.1(b), 6.1, 6.1(b), (c).

Central Fund means the fund constituted by the Central Fund Byelaw (No. 4 of 1986);

NOTE: This is the so-called Old Central Fund. For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of "Debt Credits".

Centrewrite Reinsurance means the agreement between ERL and Centrewrite Limited for the reinsurance of Centrewrite Limited in respect of its liabilities to syndicate 553 for the 1985 and 1987 years of account;

NOTE: For RRC 4 use, see *ibid.*, recital (G), §3.5; Sch. 5, §2 definition of "Name's RP Share", *ibid.*, §3.1. Centrewrite's liabilities were discussed in *SOD*.¹²

agent of the Company to which or, as the case may be, to whom the power in question has been delegated". And see *ibid.*, §55 (Equitas Re's board's power to delegate).

¹⁰ The regulatory environment and regime for Lloyd's brokers has materially changed recently: see p.57.

¹¹ Umbrella Arrangements Byelaw (Byelaw 6 of 1988) has been, in effect, revoked: see Intermediary Amendment Byelaw (No. 10 of 2000), §2. On the genre, see for example *Johns v Kelly* [1986] 1 Lloyd's Rep. 468 (Bingham J).

Certified Reinsurance Trigger Event has the meaning set out in paragraph 2.1 of schedule 3;

NOTE: For RRC 4 use, see *ibid.*, §3.5; Sch. 2, §1 definition of “Interim Proportionate Cover Declaration”, “Reinsurance Trigger Event”; Sch. 3, §§2.1, 2.4, 3.2, 5.1, 9, 11. Cf. Automatic Reinsurance Trigger Event, Automatic Trigger Event and Certified Trigger Event.

Claim means any claim, potential claim, counterclaim, claim by way of enforcement of judgment, award or order of any kind (including as to interest and cost), right of appeal, claim by way of contribution, right to set off, indemnity, cause of action, right or interest, of any kind, whether known or unknown, suspected or unsuspected, arising out of, or in any way related to or connected with any contract of insurance, liabilities under which are comprised within the definition of 1992 and Prior Business;

NOTE: For RRC 4 use, see *ibid.*, §63.2, 3.4, 3.8(a), (b), 4.5, 9.2(a), (g), (i), (m), 9.4(c), 11.3; Sch. 2, §1 definition of “Actual Insurance Creditor”, “APH Claims”, “Books and Records”, “Broker’s Claim”, “General Creditors”. For RRC 4 use of “claim”, see *ibid.*, §§3.2, 3.2(b), 5.5, 5.5(a), 6.15, 6.16, 6.16(a), 9.2(e), (f), (n), (o), (p), (q), 10.2, 10.3, 10.3(a), (b), (c), (d), 19.1, 25.1; Sch. 2, §1 definition of “Books and Records”, “Claim”, “General Creditors”, “Other Returns”, “Segregated Account Assets”, “Syndicate Reinsurances”; Sch. 3, §§11, 14; Sch. 4, §1.6. And see for example “Lloyd’s Claims Office” (RRC 4, Sch. 2, §1 definition of “Books and Records”); “Specialist Claims Unit” (RRC 4, §13). Cf. equivalent terms used in common-use claims payment securitisation trust deeds: for example, “Reinsurance Obligation in respect of American Business” (EATD, §4(a)(i)); “the Name’s liability under a policy” (LATD, §5.2(A)); “Claim” (Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.3; Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed). Cf. the wholly different “Claims” at RRC 1, Sch. 1, §1.

cost: presumably “costs” is intended.

Closed Year Names means, in respect of any Closed Year Syndicate, those members of Lloyd’s who were members of that Closed Year Syndicate acting in their capacity as members of the Closed Year Syndicate;

NOTE: For RRC 4 use, see *ibid.*, parties, “Underwriting members of Lloyd’s” (where it is defined), “Additional Underwriting Agencies (No. 10)”; recital (C), (d), (j); §§3.5, 3.6, 4.3, 5.1(a), 6.5, 6.6, 6.8, 6.9, 6.14, 9.1, 9.2, 9.2(j), 9.3, 10.1, 17(a)(i), (c), 19.2, 22.1; Sch. 2, §1 definition of “Illinois Advance”, “Illinois Collateral Reinsurance”, “Reinsured Parties”, “Syndicate 1992 and Prior Business”; Sch. 3, §§10.1, 11, 13.2, 14; Sch. 4, §§1.4(e), (f), (h), (i), 1.6; signatures. The definition and its components are multiply infelicitous. For example: (1) the terms “Year Syndicate”, “Open Year Syndicate” and “Closed Year Syndicate” are largely unknown to the Rulebook at Lloyd’s; (2) it suggests the collectivisation device is a syndicate rather than a SYA. And see the annotations to *ibid.*, definition of “syndicate” and “Syndicate”. RRC 4 (and other RRCs¹³) is in error wherever it refers (which it usually does contradictorily to *ibid.*, §3.3) to Equitas Re selling any product to any Closed Year Name. Once conventionally outwardly-RTCed, a SYA participant has no liability for any conventionally outward-RTCed liability and is incapable of buying anything including outward reinsurance — otherwise there would be exponential double counting (as RRC 4, §3.3 appears to acknowledge). Closed Year Names are completely irrelevant to RRC 4. And see annotation to RRC 4, Sch. 2, §1 definition of “Name”.

Closed Year Syndicate means any syndicate constituted for the 1992 or any prior year of account which has been reinsured to close either directly or indirectly into any Syndicate or Centrewrite;

NOTE: For RRC 4 use, see *ibid.*, parties, “Underwriting members of Lloyd’s” (where it is defined), recital (A), (C), (E), §§3.1, 3.2, 3.2(b), 3.3, 3.4(e), 5.1(b)(iii), (iv), 6.6, 6.7(e), 6.8, 6.11, 9.2, 9.2(a), (b), (c), (d), (f), (g), (h), (l), (q), (s), 9.4(c), 10.2, 15.1, 15.3, 15.3(a)-(d); Sch. 2, §1 definition of “Books and Records”, “Broker’s Group”, “Closed Year Names”, “Confidential Information”, “Insurance Creditor”, “Other Returns”, “Substitute Agent’s Appointment”, “Syndicate 1992 and Prior Business”, “Syndicate List”, “Syndicate Reinsurances”; Sch. 4, §1.4(g)(v), (h). The definition and its components are multiply infelicitous. For example, the use of “Syndicate” in “Closed Year Syndicate” is inconsistent with RRC 4, Sch. 2, §1 definition of “Syndicate” *sim*

¹² SOD, p.124 ([] and numbers in them editorially added):-

Centrewrite is exposed to 1992 and prior business in the following ways: [1] Centrewrite has reinsured to close the 1985 and 1987 years of account of Warrilow syndicates 553. Centrewrite’s liability under these reinsurance policies is to be reinsured into Equitas at no additional premium; and [2] Centrewrite has underwritten estate protection plans and individual whole account run-off policies for Names. These cover both 1992 and prior business and reinsurances of 1992 and prior business allocated to 1993 or a later year of account Centrewrite will therefore be required to make payments under estate protection plans and individual whole account run-off policies which relate to reinsurances of 1992 and prior business allocated to 1993 or a later year of account. If Centrewrite’s reserves are or become insufficient to allow it to make such payments, the Society will be obliged to make good the amount needed. If Equitas is unable to meet the 1992 and prior liabilities in full, Centrewrite will also remain contingently liable to indemnify the members of the Warrilow syndicates and may also be liable to those Names with estate protection plans or individual whole account policies which, by their terms, cover 1992 and prior business. The Society therefore also has an exposure if Centrewrite’s reserves are insufficient at the relevant time to allow it to meet these contingent liabilities.

And see for example the summary at SOD p.124 (“Centrewrite has reinsured to close the 1985 and 1987 years of account of Warrilow syndicate 553”). YAs are not outwardly-RTCed. The collectivised accounts of participants on a particular SYA are outwardly-RTCed.

¹³ See for example RRC 2, §6.1 (“the authority to be delegated hereby will include the power on behalf of the Names and on behalf of *underwriting members on any earlier year of account* reinsured directly or indirectly by the Names ...”). Italics added. Those “underwriting members” were not party to RRC 2.

pliciter: SYA participants cannot be and are not outwardly-RTCed by a YA. And see the annotations to RRC 4, Sch. 2, §1 definition of “Closed Year Name”, “syndicate” and “Syndicate”.

year of account: error for UY.

which: compounds the terminological error stated at the annotation of “Syndicate”.

Combined Litigation Settlement Funds means the sum of the Litigation Settlement Fund and the Auditor Settlement Fund;

NOTE: For RRC 4 use, see *ibid.*, §5.6; Sch. 2, §1 definition of “Settlement Fund”. See the summary at *SOD*, Ch. 2.

Completion Accounts means, in respect of each Syndicate, the accounts prepared in respect thereof pursuant to the Completion Accounts and Co-operation Agreement;

Completion Accounts and Co-operation Agreement means the completion accounts and co-operation agreement entered into or to be entered into between ERL, Equitas and each Managing Agent pursuant to a direction of the Council;

NOTE: in this work, “RRC 9”. For RRC 4 use of “Completion Accounts and Co-operation Agreement”, see *ibid.*, §§3.9, 3.11(a), (b), 17(a)(vi); Sch. 5 §2 definition of “Name’s RP Share”. RRC 9¹⁴ was entered into between Equitas Re, Equitas Ltd., and Managing Agents (as defined¹⁵), which latter became parties to the contract by a deed of adherence.¹⁶ The contract purports to bind SYA auditors, but none is a party. Under RRC 9, both Equitas Re and Equitas Ltd. agreed to use “all reasonable endeavours” to procure, for as long as a relevant Managing Agent remained a managing agency, that it would receive duplicates of LCO and LPSO electronic messages concerning advices and the settlement of any relevant Underwriting Transaction.¹⁷ Equitas Re and Equitas Ltd. further agreed to provide each such managing agency with accounting and statistical records in relation to any EquitasRe-reinsured SYA stamp of which it was the managing agency.¹⁸ For its part, every relevant Managing Agent agreed to permit Equitas Re and Equitas to review and take copies of Books and Records (as defined¹⁹) of each relevant Syndicate, and to reproduce, transform or store any information in their own computer systems.²⁰ There are appropriate confidentiality provisions.²¹

In RRC 9, the Managing Agent undertook to confer and consult with Equitas Re in order to extend, amend, alter or renew any outwards reinsurance protection of any unexpired EquitasRe-reinsured liability;²² to notify Equitas Re of its practices and procedures in relation to its administration of outwards reinsurance contracts;²³ to comply with those practices and procedures on and from the Effective Date;²⁴ and to do a variety of other things in relation to reinsurance recoveries.²⁵ In RRC 9, Equitas Re agreed to “notify” the relevant Managing Agent of any unexpired outward reinsurance contract assigned to Equitas Re under RRC 4; promptly notify the relevant Managing Agent of any “Claim”, or loss, in relation to 1992 and Prior Business which may give rise to a right to an outward reinsurance recovery, and pay the relevant Managing Agent on request money to be used as reinstatement premium or additional premium for outward reinsurance properly allocated to 1992 and Prior Business pursuant to the outward reinsurance administration practices and procedures of that Managing Agent.²⁶

RRC 9 required each Managing Agent to prepare a financial statement — the August Return ¹²⁷ — in relation to each prospective EquitasRe-reinsured SYA, in accordance with certain accounting policies and procedures, the statement to be audited by the SYA’s actual or ad hoc agreed auditor (“the Completion Accounts Auditor” — not a party to RRC 9), who was also to produce

14 See RRC 4, §3.11(a) and (b).

15 See RRC 9, §1.1; the Managing Agents were listed in *ibid.*, Sch. 3.

16 RRC 9, §1.1, definition of “Managing Agent”. The form of deed of adherence is at *ibid.*, Schedule 4.

17 RRC 9, §8.1.

18 RRC 9, §8.2; which does not oblige Equitas Re or Equitas Ltd. to keep accounting or statistical records of their own.

19 For the extensive definition, see RRC 9, §1.1.

20 RRC 9, §8.4.

21 See for example RRC 9, §10.

22 RRC 9, §7.4.

23 RRC 9, §7.2(a).

24 RRC 9, §7.2(b). In particular, the managing agency undertook:-

not to agree, settle or otherwise deal with or take any action in respect of any outwards reinsurance contracts rights under which have been assigned to [Equitas Re] under the Equitas Reinsurance Contract [RRC 4] in a way which would or might adversely affect the rights of [Equitas Re], any Syndicate or any Closed Year Syndicate in respect of that reinsurance contract[.]

25 See RRC 9, §7.2.

26 RRC 9, §7.3(a)-(c).

27 Defined at RRC 9, §1.1 as:-

the accounting return so designated for the preparation of accounts as at 31 August 1996 (or such later date as shall be advised by [Equitas Re] to the Managing Agents) in relation to Segregated Accounts in the form issued by [Equitas Re] to Managing Agents[.]

an audit report on it.²⁸ RRC 9 contained provisions covering the eventuality of such an audit report being qualified in relation to any matter;²⁹ Equitas Re disagreeing with the accounting or other treatment of any matter in the August Return 1;³⁰ and the furnishing of supplementary information in the form of a statement called August Return 2.³¹

RRC 9 envisaged various accounting errors or infelicities — and the need for various “Balancing Payments”, each to be made with interest³² — including (for example):-

(1) that the value of relevant Segregated Account Assets in relation to EquitasRe-reinsured participants on a particular SYA might be considered by Equitas Re to be lower than it should have been had the relevant managing agency complied with its various R&R obligations in relation to segregation.³³ RRC 9’s remedy is to deem the alleged shortfall to be an amount payable by the relevant managing agency — or managing agency trustees — personally, and to require its discharge in cash;³⁴

(2) that Segregated Account Assets might include assets which were not properly Segregated Account Assets: in certain cases, Equitas Re commits itself to refunding the amount to the relevant managing agency;³⁵

(3) that sums relating to Underwriting Transactions³⁶ of participants on SYAs after the 1992 UY (“Later Years of Account”³⁷) were wrongly debited to a relevant Segregated Account: in that event, the managing agency undertakes to pay the wrongly attributed amount, in cash, to Equitas Re or as it may direct.³⁸ The relevant managing agency thus binds participants on Later Years of Account;

(4) that sums may similarly have been wrongly credited to a relevant Segregated Account, in which event Equitas Re undertakes to the relevant managing agency to make the appropriate refund to the account of the relevant stamp;³⁹

(5) that the stamp of a Later Year of Account may receive assets (including reinsurance recoveries, premiums, reinsurance premium returns, etc.) properly attributable to an Equitas-RTCed SYA stamp and therefore due to Equitas Re as assignee;⁴⁰ in that event, the relevant managing agency undertakes to pay or transfer the asset “promptly on receipt” to Equitas Re;⁴¹

(6) that Equitas Re may similarly wrongly receive assets not attributable to EquitasRe-reinsured SYA participants, in which event Equitas Re undertakes to the relevant managing agency to make the appropriate payment or transfer “promptly on receipt”.⁴²

Confidential Information means all information of whatever nature in whatever form (including, for the avoidance of doubt, professional advice) relating to the business affairs of any Syndicate or Closed Year Syndicate other than information which (a) at the time when it is disclosed or obtained is in the public domain; or (b) subsequently comes into the public domain otherwise than as a result of the breach by any party (or its employees, agents, subcontractors or representatives) of the terms of this Agreement;

NOTE: For RRC 4 use, see *ibid.*, §17 heading, §17(a), 17(a)(vi), (b), (c).

²⁸ See generally RRC 9, §3.1 *et seq.*, and *ibid.*, Sch. 1.

²⁹ See RRC 9, §3.4: “If the Audit Report is qualified in respect of any matter, the Completion Accounts Auditor shall, so far as it is able, quantify the financial effect on the relevant Segregated Account of the matter in respect of which the qualification is made. Subject to the following clauses, such quantification shall be conclusive and binding on the Managing Agent.” On the Segregated Account, see RRC 2, §4.

³⁰ See RRC 9, §3.5-§3.6.

³¹ See RRC 9, §4.

³² See RRC 9, §5.9. Balancing Payments in sterling carry interest at Midland Bank plc base rate. Balancing Payments in other currencies carry interest at the “relevant three months LIBOR rate” as quoted by Midland Bank plc for acceptance of deposits in the relevant currency: *ibid.* Interest is due from the Effective Date to the date of payment: *ibid.*

³³ See generally (for example) RRC 2, §4; RRC 4, §7, RRC 8, §9.

³⁴ See RRC 9, §5.1 (“an amount equal to such shortfall ...”).

³⁵ See RRC 9, §5.2. The refund is net of expenses: *ibid.*

³⁶ RRC 9, §1.1:-

Underwriting Transaction means any claim, refund, premium, return premium, salvage, reinsurance liability, reinsurance recovery, or similar relating to insurance business, and associated expenses.

³⁷ RRC 9, §1.1:-

Later Year of Account means any syndicate for 1993 or any later year of account, including, in respect of contract of insurance allocated to 1993 or any later year of account, any Syndicate[.]

³⁸ RRC 9, §5.3. Such refund must be “demanded” before the relevant Later Year of Account is RTCed: *ibid.*, §5.5 (but §5.3 has no demand mechanism).

³⁹ RRC 9, §5.4. Such refund must be “demanded” before the relevant Later Year of Account is RTCed: *ibid.*, §5.5 (but §5.4 has no demand mechanism).

⁴⁰ On EquitasRe-reinsured SYA participants’ assignment of reinsurance recoveries etc. to Equitas Re, see for example RRC 4, §§6.1 and 6.4..

⁴¹ RRC 9, §5.7.

⁴² RRC 9, §5.8.

Contingent Insurance Creditor means any Insurance Creditor in respect of whom a liability has been incurred but not reported;

NOTE: For RRC 4 use, see *ibid.*, Sch. 3, §13.2(b), (c), (d). Cf. *ibid.*, Sch. 2, §1 definitions of “Actual Insurance Creditor”, “Insurance Creditor”.

contract of insurance means any contract of insurance (whether direct or otherwise) or reinsurance;

NOTE: For RRC 4 use, see *ibid.*, recital (J), §3.5; Sch. 2, §1 definition of “Claim”, “E&O Companies Reinsurance”, “Insurance Creditor”, “PSL Companies Reinsurance”, “Secured Obligations”. And see *ibid.*, Sch. 2, §1 definition of “reinsurance”.

Council means the Council of Lloyd’s and includes its delegates and any persons by whom it acts;

NOTE: For RRC 4 use, see *ibid.*, recital (A), (C), (D), (F), §§2.1(b), 2.2, 3.11(a), 5.1(d), 17(b); Sch. 2, §1 definition of “Completion Accounts and Co-operation Agreement”, “Managing Agent’s Agreement”, “Premiums Trust Deed”, “Substitute Agent’s Appointment”, “Supervisory Management Agreement”, “syndicate”, “Syndicate List”.

Council of Lloyd’s: see generally Lloyd’s Act 1982, s.3.

its delegates and any persons by whom it acts: on the power of Council members to delegate, see for example Lloyd’s Act 1982, s.6(5) etc.

it acts: the Council is not an incorporated entity. It does not act. Its members act.

CSU means Lloyd’s Central Services Unit;

NOTE: For RRC 4 use, see *ibid.*, §5.10 heading, §5.10.

CSU: now Members’ Services Unit, a Corporation department.

Debt Credits means, in respect of each Name, any amount offered to that Name as set out in his Finality Statement (including any State Credits) or otherwise offered in accordance with the terms of the Settlement Offer and which shall be applied towards the payment of his Name’s Premium (which may include the waiver of certain amounts owing to Lloyd’s arising out of the application of assets of the Central Fund on his behalf);

NOTE: For RRC 4 use, see *ibid.*, §5.6; Sch. 2, §1 definition of “Settlement Fund”; Sch. 5, §2 definition of “Name’s RP Share”. Debt Credits were highly relevant to RRC 1.

Declaration of Trust means the declaration of trust in relation to the Assigned Property in the form set out in Appendix 1 to this Agreement to be declared by the Trustee on the date hereof;

NOTE: in this work, RRC 7. For RRC 4 use of “Declaration of Trust”, see *ibid.*, §§3.7, 4.4, 4.6 heading, 4.6, 4.7, 4.9; Sch. 2, §1 definition of “Insolvency Event”.

Appendix 1: see this Edition, Appendix 1.3.

Dedicated Assets means the aggregate of the US Trust assets, the ECTF Assets and the Australian Custody Assets, or any of them, as the context may require;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Non Dedicated Available Assets”; Sch. 3, §6.3. A “dedicated” asset in the context of liabilities incurred at Lloyd’s refers to an asset available to discharge only a particular liability. The Central Fund does not contain dedicated assets: assets in the Central Fund are (in principle) available to discharge any relevant liability. Assets in the Lloyd’s US Surplus-Lines Common-Use Trust Fund, by contrast, are dedicated, according to the terms of the Lloyd’s US Surplus-Lines Common-Use Trust Deed, to discharging only liabilities comprised in “American Policies” as defined at *ibid.*, §1.1. And see for example RRC 4, §3.4(a)-(c); *ibid.*, Sch. 2, §1 definition of “US Trust Assets”; *ibid.*, Sch. 3, §§6.1 - 6.3; RRC 7, §2.7.

assets: presumably error for “Assets”.

DTI means the Department of Trade and Industry or such other governmental or other authority as from time to time carries out the functions in relation to insurance business carried on in the United Kingdom as are at the date of this Agreement carried out by that Department;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Secretary of State”; Sch. 5, §5.

such other governmental or other authority: now the FSA.

E&O Companies Reinsurance means the contract of insurance between ERL and various company underwriters in respect of all errors & omissions insurance liabilities in respect of 1992 and Prior Business under various policies as set out therein;

NOTE: For RRC 4 use, see *ibid.*, recital (G), §3.5.

EATD means the deed of trust to be entered into by Equitas and ERL with Citibank, N.A. as trustee, in favour of the trustee of the LATD, as may be amended from time to time;

NOTE: For RRC 4 use, see *ibid.*, recital (I), §§3.4(a), 4.2, 9.1, 9.2, 9.4; Sch. 2, §1 definition of “American Business”, “EATF”. The EATD is discussed in this work, Appendix 2.1.

LATD: see RRC 4, Sch. 2, §1 definition “Lloyd’s American Trust Deed or LATD”, and this work, Appendix 2.2.

EATF means the trust fund from time to time held under the terms of the EATD;

NOTE: For RRC 4 use, see *ibid.*, §§3.4(a), 3.8; Sch. 2, §1 definition of “US Trust Assets”; Sch. 4, §1.2(a), (b); Sch. 5, §2 definition of “Name’s RP Share”. See generally this work, Appendix 2.1.

EausCA means the custodian agreement proposed to be entered into by Equitas with the responsible authorities in Australia in connection with the revised trading arrangements proposed to be established there;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Australian Business”, “Australian Custody Assets”. Relevant Australian arrangements are outside this Edition’s scope.

ECTD means the deed of trust to be entered into by Equitas and ERL with the Royal Trust Corporation of Canada as trustee, in favour of the trustee of the LCTD, as may be amended from time to time;

NOTE: For RRC 4 use, see *ibid.*, recital (I), §§3.4(b), 4.2, 9.1, 9.2, 9.4; Sch. 2, §1 definition of “Canadian Business”, “ECTF”. And see *ibid.*, Sch. 2, §1 definition of “ECTF”, “ECTF Assets”, “ECTF Rate”. Relevant Canadian arrangements are outside this Edition’s scope.

ECTF means the trust fund from time to time held under the terms of the ECTD (together with, for the purposes of schedule 3 only, such amounts, if any, as are held in the LCTF and are available only for the discharge of 1992 and Prior Business);

NOTE: For RRC 4 use, see *ibid.*, §§3.4(b), 3.8; Sch. 2, §1 definition of “ECTF Assets”, “ECTF Rate”; Sch. 4, §1.2(a); Sch. 5, §2 definition of “Name’s RP Share”. And see *ibid.*, Sch. 2, §1 definition of “ECTD”.

ECTF Assets means the aggregate of the assets in the ECTF;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Dedicated Assets”, “ECTF Rate”; Sch. 3, §5.1(a).

ECTF Rate means the rate at which liabilities applicable to Canadian Business may be discharged from ECTF Assets alone;

NOTE: For RRC 4 use, see *ibid.*, Sch. 3, §6.1(a)(iii). And see *ibid.*, Sch. 2, §1 definition of “ECTF Assets”.

Effective Date means 12.00 BST (midday) on the business day 09.00 BST on the business day immediately following the date on which the last of the conditions set out in clause 2.1 is satisfied;

NOTE: the date on which RRC 4 takes effect. For RRC 4 use, see for example *ibid.*, §§3.2, 3.2(a) and (b), 3.9, 3.10, 4.3, 5.1(b), 5.1(b)(i)(B), 5.1(b)(ii)(B), 5.1(b)(iii)(B), 5.1(b)(iv), 5.1(c), 5.1(d), 5.3, 6.1, 6.4, 6.5, 6.10, 6.12, 6.15, 7.3; *ibid.*, Sch. 2, §1 (definition of “Assumed Liabilities”, “Segregated Account Assets”); *ibid.*, Sch. 4, §§1.1(a) and (b), 1.2(a) and (b), 1.3(a) and (b), 1.4(d), (e), (j), (k), 1.5; *ibid.*, Sch. 5, §2 (definition of “Name’s RP Share”), 7.2, 7.3, Part II, first subheading. Cf. RRC 4, Sch. 2, §1 definition of “Inception Date”, and “effective date” as used in *ibid.*, definition of “Proportionate Cover Declaration”.

[*Equitas* is defined in RRC 4, parties, “EQUITAS LIMITED” — *Ed.*]

Equitas Group means ERL and any subsidiary or holding company (whether direct or indirect) or any other subsidiary of any such holding company;

NOTE: For RRC 4 use, see *ibid.*, §16. Components of the Equitas enterprise are discussed at this Edition, Chapter 1.

Equitas Scheme means the scheme for the reinsurance by ERL of all 1992 and Prior Business as described in the Reconstruction and Renewal Byelaw;

NOTE: For RRC 4 use, see *ibid.*, recital (A), §§2.1(b)(i), (ii), (iii), 4.3; Sch. 2, §1 definition of “Reserve Group”.

[*ERL* is defined in RRC 4, parties, “EQUITAS REINSURANCE LIMITED”]

Estate Protection Plan has the meaning ascribed to estate reinsurance contract in the Personal Stop Loss Regulation (No. 2 of 1990);

NOTE: the term is not used in RRC 4 as extracted. For “estate protection plan”, see RRC 4, §5.9. Not presently relevant.

Finality Statement means, in respect of any Name the statement of that Name’s Lloyd’s affairs in respect of his 1992 and Prior Business sent to him with the Settlement Offer Document or otherwise, together with the supporting data sent in August 1996;

NOTE: For RRC 4 use, see *ibid.*, §5.6; Sch. 2, §1 definition of “Debt Credits”. On R&R “finality”, see elsewhere.⁴³

⁴³ See p.169 *et seq.*

Financial Reinsurance means each contract identified as and which should be treated as a financial reinsurance, as set out in the list entitled “List of Financial Reinsurances” in the agreed form, together with such other contracts as may be agreed between ERL and the Substitute Agent from time to time;

NOTE: For RRC 4 use, see *ibid.*, §6.1 subheading, §§6.1, 6.4, 6.5, 6.6, 6.11, 6.17; Sch. 2, §1 definition of “Segregated Account Assets”, “Segregated Account Receivables”.

Funds at Lloyd’s means, inter alia, Lloyd’s deposits, special reserve funds (whether held under an old special reserve fund trust deed or a new special reserve fund trust deed), guarantees, premium limit excess deposits and personal reserve funds;

NOTE: For RRC 4 use, see *ibid.*, §§5.6, 510.

General Creditors means, at any time, all persons who are creditors (actual, prospective or contingent) of ERL other than the Reinsured Parties in their capacity as such and, where the context requires, references to General Creditors shall include references to the amount of the claims (actual, prospective or contingent) of General Creditors. For the avoidance of doubt, references to Claims of General Creditors include the estimated costs, at any time, of the future business of ERL carried out pursuant to this Agreement;

NOTE: for RRC 4 use, see for example *ibid.*, Sch. 2, §1 definition of “Available Assets”, “Record Date”; Sch. 3, §§2.1(a) and (b), 5.1(c), §12 heading, §12. *Cf.*, and see the annotation to RRC 4, Sch. 2, §1 definition of, “Insurance Creditor”. Neither an EquitasRe-reinsured SYA participant nor a RRC 4, Sch. 2, §1-defined “Insurance Creditor”, every “General Creditor” is a personal direct creditor of Equitas Re (rather than indirectly through any EquitasRe-reinsured SYA participant). Since Equitas Re is not permitted to undertake obligations as an insurer other than further to RRC 4, presumably its “General Obligations” will be relatively small (subject to lawyers’ fees). The General Creditor has various privileges: see RRC 4, Sch. 3, §§2.1, 12. *Cf.* RRC 4, Sch. 2, §1 definition “Insurance Creditor”, “Reinsured Parties”.

Illinois Advance means the sums currently held in trust in respect of Names and Closed Year Names in respect of certain classes of business underwritten in Illinois;

NOTE: For RRC 4 use, see *ibid.*, Sch. 4, §§1.1, 1.3, 1.3(a), (b). Relevant Illinois arrangements are outside this Edition’s scope.

Illinois Collateral Reinsurance means the contract for the reinsurance of the Illinois Retained Business of Names and Closed Year Names authorised by a certificate of authority to write certain classes of insurance business in the State of Illinois made or to be made between ERL, such Names and Closed Year Names and the Substitute Agent;

NOTE: For RRC 4 use, see *ibid.*, recital (G), §3.5; Sch. 2, §1 definition of “Illinois Retained Business”, “Illinois Surplus Trust”, “Illinois Trust Fund”, “Reinsurance Indemnities”.

Illinois Retained Business shall have the meaning given in the Illinois Collateral Reinsurance;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Illinois Collateral Reinsurance”, “US Trust Rate”.

Illinois Surplus Trust means the surplus trust to be established in respect of the Illinois Collateral Reinsurance by ERL;

NOTE: For RRC 4 use, see *ibid.*, Sch. 4, §1.3(a), (b).

Illinois Trust Fund means the trust to be established in respect of the Illinois Collateral Reinsurance by ERL in accordance with Section 173.1 of the Illinois Insurance Code and §1104.70 of the Illinois Insurance Department Regulations;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “US Trust Assets”; Sch. 4, §1.3(a), (b).

Inception Date means 23.59 GMT on 31 December 1995;

NOTE: for RRC 4 use, see *ibid.*, recitals (F) and (K), §3.11(a), (b) and (c). *Cf.* RRC 4, Sch. 2, §1 definition of “Effective Date”.

Information and Administration Agreement means each agreement entered into between ERL, Lloyd’s and the Managing Agent (or any predecessor) of each Syndicate in relation to all Syndicates for which that Managing Agent (or any predecessor) acted as managing agent prior to the Substitute Agent’s Appointment, in relation to the provision of information and the administration of the Run-off prior to the date hereof;

NOTE: in this work, “RRC 8”. For RRC 4 use of “Information and Administration Agreement”, see *ibid.*, recital (b), §§3.9, 3.11(a), (b), 6.15, 17(a)(vi); Sch. 2, §1 definition of “Segregated Account Assets”, “Segregated Account Return”. The successor to and having many features in common with RRC 2,⁴⁴ RRC 8⁴⁵ was entered into in May 1996 — broadly coinciding with the

⁴⁴ See for example RRC 8, §13: “[Equitas Re] and the Managing Agent agree that the Supervisory Management Agreements shall terminate forthwith from the Commencement Date [May 8, 1996, 6pm] and shall have no further force and effect”.

Commencement Date — between the Corporation, Equitas Re and each individual managing agency of prospectively EquitasRe-reinsured SYA participants (the “Managing Agent”), in contemplation of and to facilitate the performance by Equitas Re of RRC 4,⁴⁶ and was relevant only between the Commencement Date (as defined⁴⁷) to the date of RRC 4’s execution.⁴⁸ The special nature of that caretaker period, and RRC 8 accordingly, required each Managing Agent, in relation to each specified SYA,⁴⁹ to integrate Equitas Re into the SYA management process, by (for example) policy meetings,⁵⁰ consultation before taking action on particular matters,⁵¹ dispute resolution should Equitas Re disagree with the Managing Agent’s proposed course of action,⁵² giving Equitas Re access to relevant books and records,⁵³ and obtaining Equitas Re’s prior written approval on certain matters.⁵⁴ RRC 8 expressly provided that the Managing Agent was to perform relevant managing agency agreements in such as way as gave effect to RRC 8.⁵⁵ There were appropriate provisions covering confidentiality⁵⁶ and the maintenance of Segregated Accounts.⁵⁷ In RRC 8, the Corporation — acknowledging that the Managing Agents had had no control over quantifying any EquitasRe-reinsurance premium (on which see for example RRC 4, §5) — indemnified each Managing Agent against liability arising out of the EquitasRe-reinsurance premium.⁵⁸ The indemnity was also expressly given to every members’ agency⁵⁹ even though none as such was party to RRC 8.

Insolvency Event means any of the events specified in paragraph 2.15 of the Declaration of Trust;

NOTE: For RRC 4 use, see *ibid.*, §4.10.

Insurance Creditor means any policyholder under any contract of insurance underwritten by a Syndicate or Closed Year Syndicate liabilities under which are comprised in 1992 and Prior Business other than a member or former member of Lloyd’s who is such a policyholder in his capacity as an underwriter of insurance business at Lloyd’s;

NOTE: for RRC 4 use, see *ibid.*, §§3.4(e), 3.7, 3.8, 4.2, 4.10, 6.17; *ibid.*, Sch. 2, §1 definition of “Actual Insurance Creditor”, “Contingent Insurance Creditor”, “Overseas Deposit Deed”; *ibid.*, Sch. 3, §§2.4, 6.2 (in lower case), 13.2. *Cf. ibid.* Sch. 2, §1 definition of “General Creditors” and “Reinsured Parties”. And see RRC 4, Sch. 2, §1 definition of “Secured Obligations”. While an Insurance Creditor is a creditor of an EquitasRe-reinsured SYA participant, a General Creditor is a creditor of Equitas Re personally. Neither an EquitasRe-reinsured SYA participant nor Equitas Policyholders Trustee is an Insurance Creditor. The definition recognises the former’s liabilities, but see RRC 4, §3.7, which expressly excludes every Insurance Creditor as a RRC 4 third party beneficiary.

who is such a policyholder in his capacity as an underwriter of insurance business: *viz.*, a participant on one SYA who buys insurance from participants on another SYA, and or to an individual SYA participant who buys insurance such as PSL or EPP from participants on another SYA — both endemic at Lloyd’s.

Interim Proportionate Cover Declaration means a notice or advertisement issued by or under the direction of the Board of ERL stating that a Certified Reinsurance Trigger Event has occurred and the date of such event and whether suspension of payments in respect of Reinsurance Indemnities will come into effect;

NOTE: For RRC 4 use, see *ibid.*, Sch. 3, §3.2.

45 See for example the Corporation’s then CEO’s April 30, 1996 letter to all members’ and managing agencies:-

There are two main reasons for the IAA. The SMA [Supervisory Management Agreement; RRC 2] reflected the fact that subsequent changes in circumstances could be reflected in the Equitas premium. Once the Equitas premium has been set, the protection afforded by ... [RRC 2] is no longer sufficient. ... The IAA is ... intended to provide additional protections to Equitas now that the premium is about to be set. It is no longer proposed that current managing agents will sign the Equitas reinsurance: it is proposed that a substitute agent do so. There are, however, areas where Equitas needs representations and warranties from the current managing agents. For example, in relation to information provided under ... [RRC 2].

46 See for example RRC 4, recital (B).

47 RRC 8, Sch. 2: May 2, 1996, 6pm.

48 See for example RRC 8, §1.1 (managing agency’s duty of care etc.)

49 The SYAs relevant to each signatory managing agency were specified in a customised RRC 8, Sch. 1.

50 RRC 8, §2.1. Among matters to be discussed at such meetings were (for example) the administration and processing of Claims (as defined in *ibid.*, Sch. 2); the processing and collection of reinsurance recoveries, and the maintenance of statistical records: *ibid.*, §2.1(d), (f) and (h) respectively.

51 RRC 8, §2.2, which has extensive provisions on the substantive ambit of such consultations.

52 RRC 8, §2.3.

53 RRC 8, §7.1.

54 RRC 8, §2.4, which specifies, in detail, particular matters requiring Equitas Re’s prior written approval.

55 RRC 8, §2.7.

56 See RRC 8, §6.

57 RRC 8, §9.

58 RRC 8, §5.1, but see the conditions at *ibid.*, proviso.

59 RRC 8, §5.1.

[LATD — see *Lloyd's American Trust Deed or LATD*, below — *Ed.*]

LATF means any trust fund from time to time held in respect of a Name under the terms of the Lloyd's American Trust Deed;

NOTE: For RRC 4 use, see *ibid.*, §§2.1(c), 5.1(d), 5.6, 6.3, 6.12, 11.3, 18; Sch. 2, §1 definition of “Surplus Account”, “Syndicate Loan”, “US Trust Assets”; Sch. 4, §§1.1, 1.2, 1.4(c), (k).

LCTF means any trust fund from time to time held in respect of a Name under the terms of the Lloyd's Canadian Trust Deed;

NOTE: For RRC 4 use, see *ibid.*, §§2.1(c), 5.1(d), 5.6, 6.3, 6.12, 11.3, 18; Sch. 2, §1 definition of “ECTF”, “Surplus Account”, “Syndicate Loan”; Sch. 4, §§1.1, 1.2, 1.4(c), (k).

Legal Proceedings means any legal, arbitral, administrative, regulatory or other action or proceeding (including to enforce, or any appeal from, any judgment, award or order) of any nature whatsoever;

NOTE: For RRC 4 use, see *ibid.*, §§9.2(d), 15.3(c), (d). For RRC 4 use of “legal proceedings”, see *ibid.*, Sch. 3, §9(a).

life business has the meaning ascribed to “long term business” in the Insurance Companies Act 1982;

NOTE: For RRC 4 use, see *ibid.*, recital (A); Sch. 2, §1 definition of “1992 and Prior Business”.

Lioncover means Lioncover Insurance Company Limited;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Lioncover Reinsurance”; Sch. 5, §2 definition of “Name's RP Share”; *ibid.*, §§3.1, 3.3. Lioncover⁶⁰ has close similarities to Equitas Re. Trapped PCW-managed SYA participants (much as the generality of SYA participants were trapped before R&R) bought conventional RTC from a special stamp, 9001 (comprising three senior “Lloyd's” personages) contrived by self-regulators-at-Lloyd's as part of the PCW settlement. The 9001 SYA participants then bought unlimited reinsurance from Lioncover, the Corporation providing various express Central Fund-based indemnities to that company (*cf.* the absence of similar express indemnities in relation to the generality of Equitas Re-insured liabilities) and in successive Corporation annual reports and accounts referred to considerable financial uncertainty as to its liabilities (much as Equitas Holdings does in relation to Equitas Re's liabilities) — the uncertainty was and is in practice immaterial because the financial burden fell, and falls, on Members making Central Fund contributions (*cf.* the Council purporting to exempt Members from contributing to the Central Fund to pay Equitas Re-insured liabilities). More than a decade later, self-regulators at Lloyd's procured the extrication of that stamp by the novation of their several liabilities directly to Lioncover as a source of RTC,⁶¹ so Lioncover was in direct contractual relations with the originally trapped PCW-managed SYA participants. The process was broadly: ⁶² (1) the Council appointed AUA 9 as the extraordinary agent of PCW Names for purposes of signing the novation agreement⁶³ (the novation being allegedly of “marginal positive advantage” to PCW Names⁶⁴); (2) the Council directed AUA 9 to sign the novation agreement on behalf of its principals (some of whom were not convinced); (3) after execution (a very rare instance of amendment of a conventional outward-RTC contract), AUA 9 wrote to PCW Names⁶⁵ attaching Lioncover's numbered, dated “certificate of insurance”.⁶⁶

⁶⁰ See generally RA fye 1996, p.47 (Lloyd's Central Fund report of the auditors to the Council of Lloyd's), p.49 (Lloyd's Central Fund general fund account), p.53 (Lloyd's Central Fund notes to the financial statements, note 1(i) and p.55 (note 5); and the summary at *Lloyd's v Clementson* {2} [1997] LRLR 175, 192 (Cresswell J).

⁶¹ See accordingly Syndicate Accounting Byelaw (18 of 1994), Sch. 1, §1:-
“reinsurance to close” means ... (c) a syndicate run-off reinsurance contract between members of a syndicate for a year of account and Centrewrite Limited, Lioncover Insurance Company Limited, Equitas Reinsurance Limited or any other insurance company which is designated by the Council for the purposes of this definition and is either authorised under the Insurance Companies Act 1982 or an EC company whereby that insurance company agrees to indemnify the members of the syndicate for that year of account against all known and unknown liabilities arising out of insurance business underwritten through the syndicate and allocated to that year of account

⁶² Relevant documents include, for example, September 8, 1998 consultation document; the then Chairman of Lloyd's September 8, 1998 letter to PCW Names; the then Counsel to Lloyd's February 12, 1999 letter to AUA 9; AUA 9's February 18, 1999 letter to PCW Names.

⁶³ See AUA 9's February 18, 1999 letter to PCW Names, p.1 (“If the Council decides to implement the Novation Proposals it will do so by directing AUA 9 to execute the necessary contracts on behalf of the PCW Names.”).

⁶⁴ See for example the then Counsel to Lloyd's February 12, 1999 letter to AUA 9, p.4: “There might indeed be a marginal positive advantage to PCW Names in removing syndicate 9001 from the chain, as proposed, because otherwise the recoveries from Lioncover, once held in their PTFs, would be subject also to any claims by the 9001 Names' non-PCW policyholders, whereas if they were recoverable directly by PCW Names from Lioncover there could be no such competing claims.”

⁶⁵ See for example AUA 9 October 15, 1999 letter (“I write to confirm that on 6 October 1999, the contracts were executed giving effect to the Novation proposals described in Lloyd's and our earlier letters. The reinsurance of PCW liabilities is now ceded directly to Lioncover Insurance Company Limited (replacing Syndicate 9001).”).

⁶⁶ The certificate reads:-
Issued in respect of the Policies of reinsurance to Close numbered 170787/1 and 170787/2 originally underwritten by Lloyd's syndicate 9001. WHEREAS: 1. By two policies of reinsurance to close dated 17 July 1987 numbered 170787/1 and 170787/2

Lioncover Reinsurance means any agreement between either ERL or Equitas and Lioncover for the reinsurance of Lioncover in respect of its liabilities in respect of 1992 and Prior Business;

NOTE: For RRC 4 use, see *ibid.*, Sch. 5, §2 definition of “Name’s RP Share”; *ibid.*, §3.1. Self-regulators-at-Lloyd’s procured that Lioncover bought EquitasRe-reinsurance — see RRC 1967 — for £601m, apparently £104m provided by the Central Fund.⁶⁸ The Equitas Reserving Project apparently estimated PCW liabilities substantially in the same manner as the generality of EquitasRe-reinsured SYA participants⁶⁹ (with which Lioncover’s liabilities overlap⁷⁰).

any agreement [etc.]: see RRC 19.

Litigation Settlement Fund means the fund of approximately £980 million offered to Names in accordance with the terms of the Settlement Offer Document;

NOTE: For RRC 4 use, see *ibid.*, §5.6; Sch. 2, §1 definition of “Combined Litigation Settlement Fund”. See *ibid.*, Sch. 2, §1 definition “Auditor Settlement Fund”.

Lloyd’s means the Society incorporated by Lloyd’s Act 1871 by the name of Lloyd’s;

NOTE: For RRC 4 use, see *ibid.*, parties, “Additional Underwriting Agencies (No. 9)”, “Underwriting members of Lloyd’s” (“Syndicates”), “Underwriting members of Lloyd’s (‘Closed Year Syndicates’), “Society”, “Additional Underwriting Agencies (No. 10)”; recital (A), (B), (H), §§3.9, 3.11(a), (c), 5.5, 5.6, 12(a), (b), 13, 17, 17(a)(v), (b), 24, 25.1; Sch. 2, §1 definition of “1992 and Prior Business”, “Books and Records”, “Broker”, “Council”, “Closed Year Names”, “CSU”, “Debt Credits”, “Finality Statement”, “Funds at Lloyd’s”, “Information and Administration Agreement”, “Insurance Creditor”, “LATF”, “LCTF”, “Lloyd’s American Trust Deed”, “Lloyd’s Canadian Trust Deed”, “Managing Agent’s Trustees”, “Names”, “Premiums Trust Deed”, “Reinsured Parties”, “Segregated Account Receivables”, “Settlement Agreement”, “Settlement Offer Document”, “Supervisory Management Agreement”, “syndicate”, “Syndicate 1992 and Prior Business”, “Syndicate List”; *ibid.*, §2(c), (f)(i)-(iii); Sch. 3, §13.2(d); Sch. 4, §1.3; Sch. 5, §2 definition of “Name’s RP Share”.

Lloyd’s Act 1871: viz., Lloyd’s Act 1871, s.3. The Corporation is discussed elsewhere.⁷¹

Lloyd’s American Trust Deed or LATD means the instrument dated 21 December 1995 constituting the amended and restated Lloyd’s American Trust Deed, as amended from time to time;

NOTE: For RRC 4 use of “Lloyd’s American Trust Deed”, see *ibid.*, Sch. 2, definition of “LATF”, “personal reserve fund”. For RRC 4 use of “LATD”, see *ibid.*, §§9.2, 11.1; Sch. 2, §1 definition of “EATD”.

Lloyd’s Canadian Trust Deed or LCTD means the instrument dated 26 September 1995 constituting the amended and restated Lloyd’s Canadian Trust Deed, as amended from time to time;

... the members of Lloyd’s syndicate 9001 reinsured to close the members of the syndicates specified in the respective policies for the years of account so specified 2. By a whole account retrocession contract dated 17 July 1987 Lioncover Insurance Company Limited reinsured the members of the syndicate 9001 without limitation of liability against all liability arising in respect of the policies of reinsurance to close 3. By a deed of novation dated 6 October 1999 supplemental to each policy of reinsurance to close and to the addenda thereto — (a) Lioncover ... has undertaken to each reinsured member of any of the syndicates to perform the obligations owed to that member under either reinsurance to close policy and to be bound by the terms of that policy in every way as if Lioncover ... had been a party to that policy in place of syndicate 9001 (b) the members of syndicate 9001 have been released and discharged from all liability under each policy of reinsurance to close — Lioncover Insurance Company Limited certifies that [name] is reinsured to close by Lioncover ... on the following terms: Lioncover ... undertakes to pay and make good all claims, returns and reinsurance premiums and the like taken down on and after 17 July 1987 against the underwriting accounts (and all other underwriting accounts reinsured thereinto) of the above mentioned member of any of the syndicates specified in any of the appendices forming part of either of the policies of reinsurance to close numbered 170787/1 and 170787/2 and addenda thereto.

Note erroneous use of “syndicate” for “SYA participants”.

⁶⁷ See for example December 18, 1997 letter from Equitas Re’s chairman to Equitas-RTCD SYA participants; “Lloyd’s” December 18, 1997 press release (“Lloyd’s Council Approves Lioncover reinsurance with Equitas”; also at <http://www.lloyds.com/businfo/media/pressreleases/december1997.htm> (July 13, 1998)). Per *ibid.*: “The transaction has been approved by the trustees of the Equitas Trust, as the sole shareholder of the Equitas Group, by the Equitas board and by the Department of Trade and Industry which regulates both Equitas and Lioncover.” Historically, see RRC 14, §3.2 concerning the anticipated Equitas-RTC of Lioncover, Equitas re, Equitas Ltd. and the Corporation agreeing outline terms of the RTC contract and Equitas-RTC premium of Lioncover’s reserves plus £227m (*ibid.*, §3.2(c)).

⁶⁸ See *One Lime Street*, January 1998, p.4 (“Lioncover deal agreed”):-

The Council ... has approved the terms of an agreement whereby the liabilities of Lioncover ... were reinsured by Equitas Reinsurance Ltd. with effect from the start of 1998. This reinsurance was completed for a premium of £601 million, which will be met by transferring to Equitas Lioncover’s assets, together with £104 million from Lloyd’s.

See also *SOD*, p.6 and 34.

⁶⁹ *SOD*, p.6.

⁷⁰ See for example December 18, 1997 letter from Equitas Re’s chairman to Equitas-RTCD SYA participants, p.1: “Lioncover’s business is very similar to Equitas’ existing liabilities as, in many instances, syndicates reinsured by Equitas in September 1996 participated on the same policies as the syndicates previously reinsured by Lioncover.”

⁷¹ See p.137.

NOTE: For RRC 4 use of “Lloyd’s Canadian Trust Deed”, see *ibid.*, Sch. 2, §1 definition of “LCTF”.

Managing Agent means, in relation to each Syndicate, the managing agent of that Syndicate immediately prior to the Substitute Agent’s Appointment;

NOTE: For RRC 4 use, see *ibid.*, parties, “Additional Underwriting Agencies (No. 10)”, recital (B), (H), §§2.1(b)(iv), 3.9, 3.11(a), (b), (b)(i), 5.5, 6.4, 6.15, 6.16(a), 15.2, 15.3(a); Sch. 2, §1 definition of “Completion Accounts and Co-operation Agreement”, “Information and Administration Agreement”, “Managing Agent’s Agreement”, “Managing Agent’s Trustees”, “Segregated Account Assets”, “Segregated Account Receivables”, “Supervisory Management Agreement”; Sch. 4, §§1.4(d), 1.5; Sch. 6 table heading. For RRC use of “managing agent”, see *ibid.*, recital (C), §§3.9, 3.11(a), (b), 6.6; Sch. 2, §1 definition of “Information and Administration Agreement”, “Managing Agent”, “Managing Agent’s Agreement”, “Substitute Agent’s Appointment”, “Syndicate List”; Sch.; 2, §2(g)(i); Sch. 4, §1.4(f). And see particularly RRC 4, Sch. 2, §2(g)(i) (reference to a managing agent includes a substitute agent appointed to perform any of the functions of a managing agent). And see RRC 4, Sch. 2, §1 definition of “Substitute Agent’s Appointment”.

Managing Agent’s Agreement means, in respect of any Name, the agreement under which the relevant Managing Agent was carrying out the Run-off of any Syndicate of which that Name was a member prior to the Substitute Agent’s Appointment whether in the terms of the standard managing agent’s agreement (general) (as defined in the Agency Agreement Byelaw (No. 8 of 1988)), the Standard Agency Agreement (as defined in the Agency Agreements Byelaw (No. 1 of 1985)), the Standard Sub-Agency Agreement (as defined in the Agency Agreements Byelaw (No. 1 of 1985)) or any other terms, including, where the Managing Agent was a substitute agent appointed to carry on the duties of a managing agent pursuant to an exercise of the powers of the Council under the Substitute Agent’s Byelaw (No. 20 of 1983), the terms of that appointment (including such terms as are referred to therein);

NOTE: RRC 4 as extracted does not use this term other than in this definition. Terminology at Lloyd’s concerning standard-form agency agreements is highly infelicitous. See this Edition’s Glossary, the entries “SMA 1”, “SSA 1”, “SMA 2”, “SIA 1” and “SUA 1”.⁷²

Agreement Byelaw (No. 8 of 1988): error for Agency Agreements Byelaw (No. 8 of 1988).

or any other terms: a reference principally to non-standard⁷³ forms of agency agreement.

Managing Agent’s Trustees means Additional Underwriting Agencies (No. 10) Limited and Lloyd’s, in their capacity as trustees of the Premiums Trust Funds;

NOTE: For RRC 4 use, see *ibid.*, parties, “Additional Underwriting Agencies (No. 10)”; §§6.1, 6.4, 6.7(a), 11.3, 24; Sch. 4, §§1.1, 1.4(a), (d), (g)(i), 1.5.

Members’ Agent means a person who is listed as a members’ agent in the register of underwriting agents maintained under the Underwriting Agents Byelaw (No. 4 of 1984) or any substitute agent appointed to carry on any of the functions of a members’ agent and who acts as a members’ agent on behalf of one or more of the Names;

NOTE: For RRC 4 use, see *ibid.*, §5.5; Sch. 2, §1 definition of “personal reserve fund”. For RRC 4 use of “members’ agent”, see *ibid.*, Sch. 2, §2(g)(ii) (reference to a members’ agent includes a substitute agent appointed to perform any of the functions of a members’ agent).

Names means, in respect of each Syndicate, the members of Lloyd’s as set out in the relevant Syndicate List acting in their capacity as members of the Syndicate;

NOTE: For RRC 4 use of “Name”, see *ibid.*, *passim*. The definition does not work: (1) a syndicate does not have members; (2) see the use of “Name” in, for example, RRC 4, Sch. 2, §1 definition of “Syndicate 1992 and Prior Business”. Further infelicitously, “Name” does not include “Closed Year Name” (test for example at RRC 4, §3.1(b): no “Closed Year Name” pays a “Name’s Premium”).

Names Debts means, in relation to a Segregated Account, those amounts payable by Names in respect of losses declared to 31 December 1994 but uncalled as at 15 March 1996, deferred losses owing as at 15 March 1996 and called but unpaid losses as at 1996, together, where relevant with interest thereon as taken into account in the calculation of Name’s Premiums relating to Syndicate 1992 and Prior Business;

⁷² See the Glossary.

⁷³ For a 1982 version of the non-standard agreement between Member and members’ agency, see *Henderson v Merrett* {1a} [1994] 2 Lloyd’s Rep. 193, 202-207 (Saville J). For a 1978 version of the non-standard sub-agency agreement between members’ agency and managing agency, see *ibid.*, 208-210. See also *John Hayter Motor Underwriting Agencies Ltd. v RBHS Agencies Ltd.* [1977] 2 Lloyd’s Rep. 105, 106 *et seq.* (Goff LJ). And see for example *Hambro v Burnand* [1904] 2 KB 10, 17-18 (Collins MR); *ibid.*, 23 (Romer LJ); *Commissioners of Inland Revenue v Laurence Philipps & Co. (Insurance), Ltd.* (1947) 80 Lloyd’s List Law Reports 549, 550, 553 (Atkinson J); *Commissioners of Inland Revenue v Gardner, Mountain & D’Ambrumenil, Ltd.* (1947) 80 Lloyd’s List Law Reports 297, 299 (HL).

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Segregated Account Assets”.

Name's Premium, in respect of any Name, has the meaning ascribed thereto in clause 5.1(b) of this Agreement;

NOTE: For RRC 4 use, see *ibid.*, §§3.1(b), 3.10, 3.11(b), (c), 5.1(b), 5.3 heading, 5.3, 5.5, 5.5(a), (b), (c), 5.6, 5.7, 5.8, 5.9, 5.10, 6.12, 7.2, 8(a), (b), 18; Sch. 2, §1 definition of “Debt Credits”, “Names Debts”, “Return on Surplus”, “Structured Payment Plan”; Sch. 4, §1.4(k); Sch. 5, §2 definition of “Name's RP Share”; §3.4. RRC 4 requires⁷⁴ each EquitasRe-insured SYA participant to pay his EquitasRe-insurance premium⁷⁵ as calculated by what was then the CSU⁷⁶ further to quantification by the Equitas Reserving Project.⁷⁷ The EquitasRe-insured SYA participant's liability for his personal EquitasRe-insurance premium is several and not joint.⁷⁸ The EquitasRe-insurance premium is analogous to the most recent conventional-inward-RTCing SYA participants' conventional outward-RTC premium to buy conventional outward-RTC in the ordinary way. The extent to which particular EquitasRe-insurance premiums were covertly inflated or deflated to, respectively, penalise for prior under-reserving or compensate for prior over-reserving has not yet been disclosed.

Name: does not appear to apply to a Closed Year Name who has become a Name: see annotation to RRC 4, §3.3.

Non Dedicated Available Assets means the Available Assets of ERL less the aggregate of (i) the Dedicated Assets (but adding back so much of the Dedicated Assets as ERL determines are available to it to meet Original Liabilities in respect of Residual Business, because of a surplus of assets in the relevant trust fund, or otherwise, as the case may be) and (ii) so much of the Available Assets of ERL as ERL determines are required to discharge those specific liabilities identified in clause 6.17;

NOTE: the term is not used in RRC 4. For RRC 4 use of Non-Dedicated Available Assets, see *ibid.*, Sch. 2, §1 definition of “Original Liability”, “Residual Business Rate”.

Notice of Requirements means the notice of requirements issued to ERL or Equitas (as the context may require) by the Secretary of State on 29 March 1996, in each case as amended from time to time;

NOTE: For RRC 4 use, see *ibid.*, §2.1(d), (e); Sch. 5, §3.1. According to the FSA, the Notices of Requirements are not in the public domain. It is understood from the FSA that: (1) on December 1, 2001, those notices were replaced by one so-called “scope of permission” notice for each of Equitas Re and Equitas Ltd.; (2) neither notice is a public document.

as amended from time to time: no amendments are presently known of.

[O: terms beginning with “o” are not all in alphabetical sequence — *Ed.*]

Original Liability means the net present value, discounted at the prevailing discount rate, of the amount of the unsatisfied liability (actual, prospective or contingent) which ERL would have had to Reinsured Parties at the Record Date in respect of the Reinsurance Indemnities if no Proportionate Cover Plan had ever been implemented but leaving out of account all or part of any liability in respect of which a dedicated asset is available as referred to in sub-paragraph (ii) in the definition of Non-Dedicated Available Assets;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Relevant Original Liability”; Sch. 3, §3.1(i).

discounted at the prevailing discount rate: in postulating appropriate reserves, Equitas Re artificially reduces — “discounts” — its *assets* — not its liabilities — to allow for Equitas Re's investment income when plotted against the juncture at which liabilities will become due and payable.⁷⁹

had ever: on multiple successive Proportionate Cover Plans, see RRC 4, Sch. 3, §4.

Orion/L&O Reinsurances means Syndicate Reinsurances which were taken out by any Syndicate or Closed Year Syndicate with The Orion Insurance Company PLC (in provisional liquidation) or The London & Overseas Company PLC (in provisional liquidation) including, for the avoidance of doubt, any rights to participate in a distribution, whether arising under a liquidation, scheme of arrangement or otherwise, arising in respect of any rights under such Syndicate Reinsurances;

Other Returns means, in respect of any Syndicate or Closed Year Syndicate, all rights (howsoever arising) in respect of income receivable (other than in respect of the relevant Syndicate Reinsurances), including premiums, return premiums, salvages, claim refunds and any other moneys which may be applied

⁷⁴ RRC 4, §5.10.

⁷⁵ See the treatment of “the Name's Premium” in RRC 4, §5.1(b) etc. On the EquitasRe-insurance premium's components, see the detailed provisions at *ibid.*, §5.1; and see *ibid.*, Sch. 4.

⁷⁶ RRC 4, §5.10.

⁷⁷ See p.31.

⁷⁸ RRC 4, §5.7.

⁷⁹ See p.37 *et seq.*

in reducing the amount of any liability comprised in the Syndicate 1992 and Prior Business of that Syndicate or Closed Year Syndicate but excluding any Segregated Amount Receivable;

NOTE: For RRC 4 use, see *ibid.*, §§6.1 subheading, 6.1, 6.3, 6.4, 6.5, 6.11, 6.12.

Segregated Amount Receivable: not defined and not used in RRC 4 as extracted; presumably error for “Segregated Account Receivable”.

Overseas Deposit Fund means any deposit from time to time held in respect of a Name or Names under the terms of any Overseas Deposit Deed;

NOTE: For RRC 4 use, see *ibid.*, §§3.4(c), 3.8.

Overseas Deposit Deed means any trust deed, security or custody agreement or other agreement required to be established by ERL and/or Equitas by any regulatory authority in any jurisdiction other than Canada, the United Kingdom or the United States of America (excluding for the State of Illinois) for the purpose of protecting the rights of Insurance Creditors;

NOTE: For RRC 4 use, see *ibid.*, recital (I), §§3.4(c), 4.2; Sch. 2, §1 definition of “Overseas Deposit Fund”.

Canada: see RRCs 4 and 5 references to “ECTD”, “ECTF”, etc.

United States: see RRCs 4 and 5 references to “EATD”, “EATF”, etc.

Illinois: see for example RRC 4, Sch. 2, §1 definition of “Illinois Trust Fund”, etc.

rights: viz., against Equitas Re-insured SYA participants, not against Equitas Re.

personal reserve fund means that part of the trust fund held under a Premiums Trust Deed or the Lloyd’s American Trust Deed under the control or direction of a Members’ Agent;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Funds at Lloyd’s”, “Return on Surplus”.

personal stop loss or PSL has the meaning given in the Personal Stop Loss Reinsurance Regulation (No. 2 of 1990);

NOTE: For RRC 4 use of “personal stop loss”, see *ibid.*, §5.9 heading, 5.9; Sch. 2, §1 definition of “Estate Protection Plan”, “PSL Companies Reinsurance”, “Syndicate Reinsurances”. For RRC 4 use of “PSL”, see *ibid.*, Sch. 2, §1 definition of “PSL Companies Reinsurance”.

Premiums Trust Deed means a trust deed (as amended from time to time in accordance with its terms) the parties to which include a Name and Lloyd’s in one of the relevant forms for general business approved for the time being by the Council and (under section 83 of the Insurance Companies Act 1982) the Secretary of State;

NOTE: For RRC 4 use, see *ibid.*, §§6.1, 6.2, 6.4, 6.7(a), 9.2, 11.1; Sch. 2, §1 definition of “personal reserve fund”; Sch. 4, §§1.4(a), (b), (d), (g)(i), 1.5. As traditionally configured, the PTD-premium is administered at SYA level by the relevant managing agency, acting through two trustees appointed by it.

one of the relevant forms: various forms have been promulgated from time to time.⁸⁰

forms: standard form, uniform, not negotiable.

for general business: cf. the PTD for short-term life business.

section 83 of the Insurance Companies Act 1982: see now FSA Lloyd’s Rulebook, §10.3.1.

Premiums Trust Fund means the fund of premiums and other moneys and assets from time to time held by or under the control of the Substitute Agent upon the terms of a Premiums Trust Deed;

NOTE: For RRC 4 use, see *ibid.*, parties, “Additional Underwriting Agencies (No. 10)”; §§2.1(c), 3.4(d), 5.1(d), 5.6, 6.12; Sch. 2, §1 definition of “Managing Agent’s Trustees”, “Surplus Account”, “Syndicate Loan”; Sch. 4, §1.4(k). A PTF is a personal-use fund.

Proportionate Cover Declaration means a notice or advertisement issued by ERL stating that a Proportionate Cover Plan has been implemented or adjusted and stating: the effective date of coming into effect of the Proportionate Cover Plan or, as the case may be, the effective date of the adjustment to such Proportionate Cover Plan; the Proportionate Cover Rate or Rates; and whether any Reinsured Names may be entitled to payments under paragraph 13 of schedule 3;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Interim Proportionate Cover Declaration”; Sch. 3, §7.

Reinsured Names: not defined in RRC 4 (but see at RRC 7, §1.1). Presumably error for “Names”.

⁸⁰ See generally *Lloyd’s v Robinson* [1999] 1 WLR 756 (HL) on appeal from [1997] LRLR 1 (CA).

Proportionate Cover Plan means an adjustment of the liabilities of ERL in respect of the Reinsurance Indemnities to Reinsured Names in accordance with clause 3.5 and schedule 3;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Original Liability”, “Proportionate Cover Declaration”; Sch. 3, §1 heading, 2.1(a), (b), 4, 5.1 heading, 5.1, 5.3, 6.3, 13.2, 14. For RRC 5 use, see *ibid.*, Sch. 3, §16(b). *Cf.* “Retrocession Plan”. The term is unclear: is a Proportionate Cover Plan: (1) the *ibid.*, Sch. 3, §3.1 adjustment (see *ibid.*, Sch. 2, §1 definition of “Proportionate Cover Plan”, whose sole active ingredient is that adjustment regardless of when it takes effect); (2) the *ibid.*, Sch. 3, §3.2 taking effect of the adjustment; or (3) the *ibid.*, Sch. 3, §5.1 “implementation” of “a” Proportionate Cover Plan?

adjustment: read with RRC 4, Sch. 3, §3.1, “adjustment” indicates that a Proportionate Cover Plan necessarily involves a Proportionate Cover Rate. But RRC 4, Sch. 3, §5.1 and RRC 7, §2.15(b) read with (c) suggests that a Proportionate Cover Plan goes beyond a mere RRC 4, Sch. 3, §3.1 adjustment, and therefore does not occur at all in an Automatic Reinsurance Trigger Event.

Proportionate Cover Rate means the percentage rate by which the Original Liabilities, or a relevant part of them, must be multiplied in order for ERL to be able to discharge the Original Liabilities from the Available Assets, and as the same may be calculated separately for American Business, Canadian Business, Australian Business and Residual Business (where applicable) in accordance with paragraph 6.1 of schedule 3;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Proportionate Cover Declaration”; Sch. 3, §§2.(b), 2.4, 3.1(i), 5.1, 5.1(b), 6.1 heading, 6.1, 6.1(b), (c), (d), 7 heading, 7. See principally RRC 4, Sch. 3, §6.1 *et seq.* *Cf. ibid.*, Sch. 2, §1 definition of “Retrocession Rate”. Adjusting in accordance with a Proportionate Cover Rate appears to be the essential ingredient in every Proportionate Cover Plan (a point which seems to be obscured in RRC 4, Sch. 3, §3.1, especially read with *ibid.*, §5.1). But such a plan does not appear to be a necessary ingredient in such a rate.

PSL Companies Reinsurance means the contract of insurance between ERL and certain company underwriters in respect of personal stop loss liabilities in respect of 1992 and Prior Business under various policies as set out therein;

NOTE: For RRC 4 use, see *ibid.*, recital (G), §3.5. RRC 4 uses “PSL Companies” without defining it: see *ibid.*, Sch. 2, §1 definition of “Reinsured Parties”.

Reconstruction and Renewal Byelaw means the Reconstruction and Renewal Byelaw (No. 22 of 1995);

NOTE: For RRC 4 use, see *ibid.*, recital (A), (D), §§12(a), (b), 17(b); Sch. 2, §1 definition of “Equitas Scheme”. Byelaw 22 of 1995 comprehensively and cumulatively⁸¹ empowered the Council (invoking various constitutional powers⁸²) concerning every aspect of R&R. The byelaw, which took precedence over most⁸³ other conflicting measures,⁸⁴ expressly required every affected Member to perform RRC 4.⁸⁵ Its validity was unsuccessfully challenged in *Leighs*⁸⁶ — the Court of Appeal held that the measure was *intra vires* notwithstanding known existing fraud allegations.⁸⁷ In Byelaw 22 of 1995, the Council empowered itself to (for example):-

(1) prepare and carry into effect the so-called “Equitas scheme” on such conditions as may appear to the Council to be desirable or expedient,⁸⁸ prescribe relevant conditions and requirements, and give relevant directions as it may think fit from time to time⁸⁹ (the Council did make numerous R&R-related directions,⁹⁰ the validity of which were upheld by the Court of Appeal⁹¹);

⁸¹ Byelaw 22 of 1995, §19.

⁸² *Viz.*, Lloyd’s Act 1911, s.7, Lloyd’s Act 1982, s. 6(2) and 8(3), and *ibid.*, Sch 2, §(1), (4), (15), (16), (19), (21) and (24): Byelaw 22 of 1995, preamble.

⁸³ The exceptions were Byelaw 15 of 1993 (Byelaw 22 of 1995, §14(2)(a)); any agreement entered into or undertaking given by the Council under Byelaw 16 of 1993, §2 (Byelaw 22 of 1995, §14(2)(b)) and any agreement entered into or undertaking given by the Council under Byelaw 22 of 1995, §15 (Byelaw 22 of 1995, §14(2)(c)).

⁸⁴ Byelaw 22 of 1995, §14(1).

⁸⁵ Byelaw 22 of 1995, §4(5). Any failure by the Member to observe or perform it is a failure to observe or perform an obligation imposed by the byelaw: *ibid.*

⁸⁶ *Lloyd’s v Leighs* {1b & 2b} [1997] CLC 1398, 1403 (CA). The challenge was repeated, with like result, in *Lloyd’s v Fraser* [1999] Lloyd’s Rep IR 156 (CA). For a summary of the allegation, see *ibid.*, 162 (Hobhouse LJ): the defendants:-

challenged the validity of the Bye-Laws and the various resolutions relied upon [by the Corporation]. These were essentially *ultra vires* arguments based upon the submission that they went outside the purposes for which the Society [*viz.*, the Corporation] was empowered to make bye-laws or pass resolutions either on the true construction of those powers or because they were implicitly outside those powers since they were directed to, so it was alleged, relieving the Society from liability for fraud or at the least assisting the Society to protect itself against or, in practical terms, avoid liability for fraud.

The Corporation does not have and never has had any power to make byelaws: see now Lloyd’s Act 1982, s.6(2).

⁸⁷ See the summary at *Lloyd’s v Fraser* [1999] Lloyd’s Rep IR 156, 165 (Hobhouse LJ). On relevant fraud, see *Lloyd’s v Jaffray* {2b} (Court of Appeal, July 26, 2002) on appeal from *ibid.* {2a} [2000] CLC 725 (Cresswell J).

⁸⁸ §3(1)(a) and (b). See also *ibid.*, §3(2) (which envisaged DTI authorisation); §3(3) (which envisaged the formation of two separate Equitas companies); §4 (“reinsurance” contracts between Members and Equitas, on which see also *ibid.*, §4(2)).

⁸⁹ Byelaw 22 of 1995, §2(2)(a) and (b). And see *ibid.*, §2(3). On directions, see also *ibid.*, §6.

prescribe the form and terms of any agreement under which, under the R&R proposals, persons who participate in the proposals may agree to settle or compromise any claim, dispute or legal proceedings;⁹² and generally implement R&R with such variations, modifications, exceptions, additions and supplementary provisions as may appear to it from time to time to be desirable or expedient;⁹³ and do all such things as may appear to it to be desirable or expedient for the purposes of, or in connection with, the implementation of the R&R proposals and exercise any of the powers conferred by the byelaw and any other powers conferred on it by any other instrument;⁹⁴

(2) hold, allocate and apply any funds (including without limitation funds raised or contributed to the Society under this byelaw, funds of the Society raised or held under Lloyd's Acts 1871 to 1982, under Byelaw 4 of 1986 or any other byelaw;⁹⁵

(3) direct any Member or underwriting agent to execute all such deeds and documents and to do all such acts and things as may appear to the Council to be desirable or expedient in connection with or for the purposes of any Equitas "reinsurance" contract;⁹⁶ and bind itself by undertakings, etc., fettering and delineating the future exercise of its powers;⁹⁷

(4) propose and enter into any settlement, compromise or arrangement with any person in respect of any claim or dispute to which the Society is a party or in which it is interested, propose any settlement, compromise or arrangement between any other parties; institute, continue and prosecute any legal proceedings in the name of and on behalf of the Corporation or otherwise in the courts of any jurisdiction, in any tribunal; settle or discontinue legal proceedings; and take any other action in relation to any claim, dispute or legal proceedings which appears to the Council to be desirable or expedient.⁹⁸ The byelaw particularly envisaged the Corporation giving undertakings (including indemnities) and empowered the Council to cause the Corporation to do so accordingly;⁹⁹

(5) do various other things, such as (for example) deal with and release estimated surpluses and profits¹⁰⁰ and pay profit commission thereon (in variance of the relevant standard agency agreement provisions);¹⁰¹ require members' and managing agencies, Lloyd's advisers (now obsolete) and any corporate Members to pay to the Corporation by way of contribution to R&R's financing, such amounts at such times and calculated in such manner as the Council may specify;¹⁰² require Lloyd's brokers and umbrella brokers (now obsolete) to pay to the Corporation, in order to contribute contributing directly or indirectly to R&R's financing, such amounts as the Council may specify;¹⁰³ enter into "arrangements" with various specified persons to contribute to R&R's financing;¹⁰⁴ borrow or raise money in any manner for the purpose of promoting or assisting R&R and apply, dispose of or make arrangements with respect to any of the Corporation's current or future property, including any money or other property or assets held as part of the Central Fund.¹⁰⁵

Record Date means the date on which a valuation of Available Assets, Original Liabilities and General Creditors takes place for the purposes of paragraph 5.1 of schedule 3;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of "Available Assets"; "Original Liability"; Sch. 3, §5.1.

reinsurance includes, except where the context requires otherwise, retrocession;

NOTE: For RRC 4 use, see *ibid.*, *passim*. And see *ibid.*, Sch. 2, §1 definition of "contract of insurance".

⁹⁰ See for example RRC 2, recital (D); RRC 8, recital (C); RRC 12, recital (D); RRC 10, §1 (the Brokers' Contribution Requirements); RRC 12, §1.1 (the Conditional Closure Direction). See especially RRC 14, recital (C)(2) ("the Council has directed or will direct Names to enter into the Reinsurance Contract [RRC 4] and the Substitute Agent [AUA 9] to execute it on their behalf"). And see *ibid.*, §6.15: "Lloyd's undertakes to take all such steps as are reasonably within its powers to ensure compliance by managing agents with the direction to enter into the Completion Accounts and Co-operation Agreement [RRC 9][.]" AUA 9 was appointed by direction made under Byelaw 20 of 1983.

⁹¹ *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1403 (CA).

⁹² Byelaw 22 of 1995, §8(2).

⁹³ Byelaw 22 of 1995, §2(1)(a).

⁹⁴ Byelaw 22 of 1995, §2(1)(b).

⁹⁵ Byelaw 22 of 1995, §2(4)(a).

⁹⁶ Byelaw 22 of 1995, §4(1)(d).

⁹⁷ See Byelaw 22 of 1995, §15.

⁹⁸ Byelaw 22 of 1995, §8(1).

⁹⁹ Byelaw 22 of 1995, §7.

¹⁰⁰ See Byelaw 22 of 1995, §9. And see *ibid.*, §14(4).

¹⁰¹ See Byelaw 22 of 1995, §10.

¹⁰² See Byelaw 22 of 1995, §11.

¹⁰³ See Byelaw 22 of 1995, §11A (added as at July 9, 1996).

¹⁰⁴ See Byelaw 22 of 1995, §12. The specified persons are any panel auditor; any person who is or has been a Lloyd's broker; any person who is or has been an underwriting agent; any Lloyd's adviser (now obsolete); any approved run-off company; any person who is or has been an umbrella broker; any person who is or has been a director, partner or manager of a Lloyd's broker, umbrella broker or underwriting agent; any such other person as the Council may think fit: *ibid.*, §12(2).

¹⁰⁵ See Byelaw 22 of 1995, §13. There is also power to write off, release or agree not to sue for payment of any sum owing to the Corporation: *ibid.*, §13(2). The better view is that the Central Fund is not part of the Corporation's personal assets.

Reinsurance Indemnities means the indemnity contained in clause 3 of this Agreement and the indemnities contained in any other contract of reinsurance underwritten by ERL other than, for the purposes of schedule 3 only, the Illinois Collateral Reinsurance;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Interim Proportionate Cover Declaration”, “Original Liability”, “Proportionate Cover Plan”, “Reinsured Parties”, “Relevant Original Liability”, “Relevant Reinsurance Indemnities”; Sch. 3, §3.1, 5.3, 9, 10.1, 11. And see *ibid.*, Sch. 2, §1 definition “Reinsurance Obligation”. Cf. the separate, additional indemnities at *ibid.*, §10.2.

Reinsurance Obligation means the obligation of ERL to reinsure the 1992 and Prior Business subject to and in accordance with clause 3;

NOTE: For RRC 4 use, see *ibid.*, §§2.1(a), (d), (e), 3.1 heading, subheading, 3.2, 3.5, 3.8(b), 4.1(a), 4.19a(i), (ii), 4.10, 5.1, 6.4, 9.4(c), 10.2, 21; Sch. 4, §1.4(d). And see *ibid.*, Sch. 2, §1 definition “Reinsurance Indemnities”. Cf. *ibid.*, definition “Retrocession Obligation”.

reinsurance to close has the meaning given to it in the Syndicate Accounting Byelaw (No. 18 of 1994) and reinsured to close and similar terms shall be construed accordingly;

NOTE: For RRC 4 use, see *ibid.*, recital (F), §3.3; Sch. 2, §1 definition of [Syndicate 1992 and Prior Business], “Syndicate Reinsurances”. On RTC, see p.207 *et seq.*

has the meaning given to it in the Syndicate Accounting Byelaw (No. 18 of 1994): this is discussed elsewhere.¹⁰⁶

Reinsurance Trigger Event means a Certified Reinsurance Trigger Event or an Automatic Reinsurance Trigger Event as the case may be;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Automatic Reinsurance Trigger Event”, “Certified Reinsurance trigger Event”; Sch. 3, §2.1 heading, §3.1.

Reinsured Parties means the Names, the Closed Year Names, Centrewrite Limited, the E&O Companies, the PSL Companies and all other underwriting members of Lloyd’s or other persons reinsured by ERL under the terms of any reinsurance contract entered into by ERL in their respective capacities as persons entitled to the benefit of the Reinsurance Indemnities but not in any other capacity and includes any permitted assignee and any person deriving title from any such person or any permitted assignee of any such person;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “General Creditors”, “Original Liability”; Sch. 3, §3.1. Cf. the materially different definition at RRC 5, Sch. 1, §1. Cf. RRC 4, Sch. 2, §1 definition of “General Creditors”, “Insurance Creditors”.

Relevant Available Assets means so much of the Available Assets as are available to discharge liabilities applicable to American Business, Canadian Business, Australian Business and Residual Business, as the case may be;

NOTE: For RRC 4 use, see *ibid.*, Sch. 3, §§2.1(a), (b), 2.2.

Relevant Original Liability means so much of the Original Liability as relates to the Relevant Reinsurance Indemnities applicable to the American Business, Canadian Business, Australian Business and Residual Business, as the case may be;

NOTE: RRC 4 as extracted does not use this term other than in this definition. For *ibid.*’s use of “Relevant Original Liabilities”, see *ibid.*, Sch. 2, §1 definition of “Residual Business Rate”; Sch. 3, §§2.1(a) and (b); 5.1(b).

Relevant Reinsurance Indemnities means the portion of the Reinsurance Indemnities applicable to the American Business, Canadian Business, Australian Business and Residual Business, as the case may be;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Relevant Original Liability”; Sch. 3, §11. The definition covers whatever part of the Reinsurance Indemnities applies to the American Business, and or the Canadian Business, and or the Australian Business, and or the Residual Business, depending on context.

and: presumably “and or” is intended.

Relevant Rights has the meaning set out in clause 6.6;

NOTE: For RRC 4 use, see *ibid.*, §§6.6, 6.7(a)-(f), 6.8, 6.10, 6.12, 6.14.

Reserve Group means any of the groups established in connection with the computation of reserves in connection with the Equitas Scheme for 1985 and prior years, 1986 to 1992 and 1992 and prior years pursuant to agency agreements entered into with Syndicates;

NOTE: For RRC 4 use, see *ibid.*, §§3.9, 6.16(a).

¹⁰⁶ See p.207.

Residual Business means the underwriting business of a Name other than his American Business, Canadian Business and Australian Business;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Non Dedicated Available Assets”, “Proportionate Cover Rate”, “Relevant Available Assets”, “Relevant Original Liability”, “Relevant Reinsurance Indemnities”, “Residual Business Rate”; Sch. 3, §§5.1(b), 6.1, 6.1(b).

Residual Business Rate means the rate at which ERL can discharge its Relevant Original Liabilities in respect of Residual Business from its Non-Dedicated Available Assets;

NOTE: For RRC 4 use, see *ibid.*, Sch. 3, §§6.1(a)(i), (b), (c), (d), 6.2.

can: meaningless: is capable of meaning “is permitted to” and or “is able to”. Presumably the latter is intended.

Retrocession Agreement means the agreement of even date herewith between ERL and Equitas for the retrocession of, inter alia, 1992 and Prior Business and the delegation of the Run-off in the form set out in Appendix 2;

NOTE: For RRC 4 use, see *ibid.*, recital (G), §§3.6, 6.16(b), 9.3, 17(a)(vi); Sch. 2, §1 definition of “Available Assets”, “Retrocession Obligation”, “Retrocession Plan”, “Retrocession Rate”, “Trigger Event”; Sch. 3, §§2.1(c), 17 definition of “Available Surplus”; Sch. 5, §§3.2, 5. In this work, the Retrocession Agreement is referred to as RRC 5.

Retrocession Obligation means the obligation of Equitas to indemnify ERL pursuant to the Retrocession Agreement;

NOTE: For RRC 4 use, see *ibid.*, §2.1(e). *Cf. ibid.*, Sch. 2, §1 definition “Reinsurance Obligation”.

Retrocession Plan has the meaning set out in the Retrocession Agreement;

NOTE: For RRC 4 use, see *ibid.*, Sch. 3, §13.1. Also defined at RRC 5, Sch. 1, §1. *Cf.* RRC 4, Sch. 2, §1 definition “Proportionate Cover Plan”.

Retrocession Rate has the meaning set out in the Retrocession Agreement;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Adjustment Entitlement”; Sch. 3, §13.1. And see RRC 5, Sch. 3, §6.1 etc. *Cf.* RRC 4, Sch. 2, §1 definition “Proportionate Cover Rate”.

Return on Surplus means, in relation to a Name, return (whether income or capital) earned on assets comprised in any Surplus Account and allocable to that Name prior to the date on which those assets are transferred by the Substitute Agent to Equitas in payment (or part payment) of the Name’s Premium of the Name or, if not so transferred, the date on which those assets are transferred by the Substitute Agent to a personal reserve fund of the Name;

NOTE: For RRC 4 use, see *ibid.*, §5.1(b)(v). And see RRC 4, Sch. 2, §1, definition of “Surplus”. Not presently relevant.

Run-off means the administration and run-off of the Syndicate 1992 and Prior Business of any Syndicate or any part thereof;

NOTE: For RRC 4 use, see *ibid.*, heading, Part II heading, §9.1 heading, §§9.1, 9.2, 9.4, 9.4(b), Part III subheading, 11.1 heading, 11.1, 11.4, 12 heading, 15.3(b), 19.2 heading; Sch. 2, §1 definition of “Information and Administration Agreement”, “Managing Agent’s Agreement”, “Retrocession Agreement”, “Run-off Administration Agreement”. For RRC use of “run-off”, see *ibid.*, recital (G); Sch. 2, §1 definition of “Syndicate Reinsurances”; Sch. 6, table heading.

Run-off Administration Agreement means any agreement entered into by Equitas with any third party for the provision of services to Equitas in relation to the administration of any Run-off;

NOTE: For RRC 4 use, see *ibid.*, §17(a)(vi).

Run-off Date means the date hereof;

NOTE: For RRC 4 use, see *ibid.*, §2.1(c), Part III subheading, 11.1 heading, §§11.1, 11.4, 12 heading. RRC 4’s date is September 3, 1996.

Secretary of State means the Secretary of State for Trade and Industry or any other person exercising the relevant powers of the Secretary of State for Trade and Industry or the secretary of state having responsibility for such other governmental or other authority as from time to time carries out the functions in relation to insurance business carried on in the United Kingdom as are at the date of this Agreement carried out by the DTI;

NOTE: For RRC 4 use, see *ibid.*, §§2.1(d), (e); Sch. 2, §1 definition of “Notice of Requirements”, “Premiums Trust Deed”; Sch. 3, §3.1. And see RRC 5, §1(a) and (b).

other person: now the FSA.

Secured Obligations means all moneys and liabilities (including contingent liabilities) whatsoever which may be due, owing or payable by any Name or any Closed Year Name under any contract of insurance or reinsurance which has been reinsured by ERL under the terms of this Agreement;

NOTE: For RRC 4 use, see §§4.1(b), 4.7, 4.8, 4.9. Cf. the identical definition at RRC 7, §1.1. See also RRC 4, Sch. 2, §1 definitions of “General Creditors” and “Insurance Creditor”. “Secured Obligations” is invoked to: (1) prohibit the return of premium payable on Equitas Re’s winding-up (RRC 4, §4.1(b)); (2) require Equitas Re and Equitas Ltd. to give Equitas Policyholders Trustee certain information (*ibid.*, §4.7); (3) require AUA 9 to discharge its RRC 4, §4.8 functions. And see *ibid.*, §4.9. But “Secured Obligations” appears to be merely synonymous with “Reinsurance Obligation”.

Closed Year Name: a Closed Year Name owes nothing: conventional outward RTC has extricated him from all his outward-RTCd liabilities;¹⁰⁷ see annotation to RRC 4, Sch. 2, 61 definition “Closed Year Name”.

under any contract of insurance or reinsurance: the SYA participant enters into a wide variety of other contracts, such as with such service providers as SYA participants’ auditors, lawyers, etc. Paying liabilities arising under those contracts are not “Secured Obligations”.

Security Interest means any mortgage, charge, pledge, lien, right of possession or detention, right of set-off or any encumbrance or security interest whatsoever, howsoever created or arising or ranking in point of priority;

NOTE: For RRC 4 use, see *ibid.*, §§6.1, 6.6, 6.13; Sch. 2, §1 definition of “Segregated Account Receivables”; Sch. 4, §1.4(a), (f).

point of: a term unknown to relevant insolvency law.

Segregated Account means, in respect of any Syndicate, the segregated account established pursuant to a Supervisory Management Agreement in respect of the Syndicate 1992 and Prior Business of that Syndicate or where, with the approval of ERL no Segregated Account was established, that part of such Syndicate’s assets which relates to Syndicate 1992 and Prior Business of that Syndicate;

NOTE: For RRC 4 use, see *ibid.*, §§5.1(b)(i)(B), (ii)(B), (iii)(B), (iv), 7.1 heading, 7.2, 8(b), 11.3; Sch. 2, §1 definition of “Assumed Liability”, “Names Debts”, “Segregated Account Assets”, “Segregated Account Receivables”, “Segregated Account Return”, “Syndicate Loan”; Sch. 4, §1.1 heading, §§1.1(a), (b), 1.2(a), (b); Sch. 5, §2 definition of “Name’s RP Share”. Not presently relevant.

Segregated Account Assets means (i) in relation to a Segregated Account those assets at the Effective Date which in accordance with the Supervisory Management Agreement and the Information and Administration Agreement are held in or treated as assets in or which ought to be held in or treated as assets in the Segregated Account, including cash, securities, bills, bonds, certificates of deposit, bills of exchange, Financial Reinsurances, Segregated Account Receivables, Syndicate Loans, book debts and all rights and claims in relation thereto, but excluding Names Debts, and (ii) where no Segregated Account has been established in relation to Syndicate 1992 and Prior Business, those assets relating to Syndicate 1992 and Prior Business which have been designated as Segregated Account Assets by the Managing Agent with the concurrence of Equitas and/or ERL;

NOTE: For RRC 4 use, see *ibid.*, recital (E), §§3.1(a), 5.1(b)(i)(B), (ii)(B), (iii)(B), (iv), 7.1, 7.2; Sch. 2, §1 definition of “Segregated Account Receivables”; Sch. 4, §§1.1, 1.1(a), 1.2, 1.2(a), 1.3, 1.3(a). In relation to Syndicate 1992 and Prior Business, the managing agency of each participant on each relevant SYA was required to keep a so-called Segregated Account,¹⁰⁸ containing (as adjusted from time to time before R&R went unconditional¹⁰⁹) such PTF, LATF, Canadian Combined-Use TF 1999 and other relevant assets as the managing agency considered related to such business, and to be used solely to meet relevant Syndicate 1992 and Prior Business Claims (as defined¹¹⁰) and expenses,¹¹¹ and to receive relevant reinsurance recoveries and other relevant receipts.¹¹² The managing agency undertook to procure due compliance by managing agency trustees.¹¹³ Assets actually or putatively in Segregated Accounts formed part of the consideration for the EquitasRe-reinsurance under RRC 4.¹¹⁴

Segregated Account Receivables means assets which, in relation to a Segregated Account, consist of a right of a Name or a Closed Year Name to receive money or other asset, whether that right is actual or contingent and whether or not, as at the date hereof, it is presently existing property or a mere expectancy

¹⁰⁷ See p.207 *et seq.* and RRC 4, §3.3.

¹⁰⁸ See generally RRC 2, §4.1 *et seq.*

¹⁰⁹ RRC 2, §4.2.

¹¹⁰ See RRC 2, Sch 1, §1: “Claim means any claim arising out of any contract of insurance, within the definition of Syndicate 1992 and Prior Business.” See *ibid.* for the definition of “Syndicate 1992 and Prior Business”.

¹¹¹ See RRC 2, §4.5-§4.6 (payment of claims and expenses).

¹¹² See RRC 2, §4.7-§4.11 (recoveries and receipts).

¹¹³ RRC 2, §4.1 (gathering in) and *ibid.*, §4.5(a) (paying out).

¹¹⁴ RRC 4, §3.1(a). And see *ibid.*, §7.

excluding rights in respect of the proceeds of Syndicate Reinsurances, but including, without limitation, the rights of the Name or the Closed Year Name in respect of amounts receivable in relation to a Segregated Account, including payments due from Managing Agents or Lloyd's Central Accounting, premiums, premium returns (other than premium returns in respect of Financial Reinsurances) and salvages to the extent that the same are Segregated Account Assets, and the benefit of any mortgage, pledge, lien, assignment by way or security or any Security Interest whatsoever or any letter of credit or other form of credit support held in respect thereof;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of "Segregated Account Assets"; Sch. 4, §§1.4(a)-(f), (k). Not presently relevant.

by way or security: presumably "by way of security" is intended.

Segregated Account Return means the agreed Preliminary Balance Sheet and Equitas Segregated Account Return as at 31 December 1995 as defined in the Information and Administration Agreement and the paper entitled "Principles for Preparation" dated 12 February 1996 prepared in respect of each Syndicate;

NOTE: RRC 4 as extracted does not use this term other than in this definition. Not presently relevant.

Settlement Agreement means the agreement entered into between, inter alia, Lloyd's, ERL and Accepting Names in the form set out in Appendix 1 to the Settlement Offer Document;

NOTE: in this work, "RRC 1". For RRC 4 use of "Settlement Agreement", see *ibid.*, §§5.4(a), 5.6(b); Sch. 5, §2 definition of "Name's RP Share".

Settlement Fund means the sum of the Combined Litigation Settlement Funds and the Debt Credits;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of "Auditor Settlement Fund", "Combined Litigation Settlement Funds", "Litigation Settlement Fund".

Settlement Offer means the offer, the terms of which are contained in the Settlement Offer Document, and any revision or amendment thereof;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of "Accepting Name", "Debt Credits", "Settlement Offer Document", "Terms and Conditions".

Settlement Offer Document means the document dated 30 July 1996 by which Lloyd's made an offer to Names, inter alia, to settle the litigation in the Lloyd's market arising out of 1992 and Prior Business;

NOTE: in this work, "SOD". For RRC 4 use of "Settlement Offer Document", see *ibid.*, "Accepting Name", "Auditor Settlement Fund", "Finality Statement", "Litigation Settlement Fund", "Settlement Agreement", "Settlement Offer", "Terms and Conditions".

Structured Payment Plan means a collateralised, interest bearing plan which may be offered to a Name by ERL to allow for payment by instalments of part of his Name's Premium subject to the Name agreeing to pay interest on the deferred amount and to put in place a guarantee;

NOTE: For RRC 4 use, see *ibid.*, §5.4(b).

Subscription Agreement means the agreement between ERL and Equitas under which ERL agrees to subscribe and Equitas agrees to issue to ERL, ordinary shares in Equitas;

NOTE: For RRC 4 use, see *ibid.*, Sch. 5, §5.

to subscribe and: presumably "to subscribe for and".

[*Substitute Agent* is defined at RRC 4, parties, "ADDITIONAL UNDERWRITING AGENCIES (NO.9) LIMITED" — *Ed.*]

Substitute Agent's Appointment means the direction made by the Council under the Substitute Agents Byelaw (No. 20 of 1983) for the appointment of the Substitute Agent as substitute managing agent of each of the Syndicates and the Closed Year Syndicates as referred to in Recital (C);

NOTE: For RRC 4 use, see *ibid.*, recital (C), §§4.8, 11.2; Sch. 2, §1 definition of "Information and Administration Agreement", "Managing Agent", "Managing Agent's Agreement", "Substitute Agent's Agreement".

managing agent of each of the Syndicates and the Closed Year Syndicates: infelicitous: in reality, the managing agency is retained by and acts for individual participants on a particular SYA, not by or for a syndicate or SYA.

Supervisory Management Agreement means each supervisory management agreement entered into between ERL, Lloyd's and a Managing Agent pursuant to a direction of the Council made on 18 December 1995;

NOTE: in this work, "RRC 2". For RRC 4 use of "Supervisory Management Agreement", see *ibid.*, recital (B), §§3.9, 3.11(a), (b); Sch. 2, §1 definition of "Segregated Account", "Segregated Account Assets". Byelaw 22 of 1995 envisaged supervisory man-

agement agreements.¹¹⁵ Self-regulators at Lloyd's required all managing agencies to enter into such agreements.¹¹⁶ A dispute resolution panel was provided.¹¹⁷ RRC 2 was the short-term predecessor to RRC 8 and terminated, appropriately, on the Commencement Date.¹¹⁸ It was entered into in December 1995 between the Corporation, Equitas Re, and each individual managing agency of prospectively EquitasRe-reinsured SYA participants (the "Managing Agent"), in contemplation of and to facilitate the process whereby the liabilities of EquitasRe-reinsured SYA participants were readied for managerial transfer to Equitas Re under RRC 4.¹¹⁹ There were appropriate confidentiality provisions.¹²⁰ Special tasks provided for by RRC 2 included segregating relevant money in Segregated Accounts (see below), and integrating Equitas Re¹²¹ into the SYA management process by (for example) release to it of relevant information via the appropriate Reserve Group¹²² (as defined¹²³), and notifying it of "significant matters".¹²⁴ The Managing Agency particularly promised to "promptly" notify Equitas Re and the Corporation of matters likely to materially affect the EquitasRe-reinsurance premium, the value of relevant reinsurance recoveries, and the value of relevant assets.¹²⁵ There was also provisions for (for example) policy meetings,¹²⁶ compulsory prior consultation,¹²⁷ Equitas Re's access to relevant books and records,¹²⁸ and Equitas Re's compulsory prior written approval.¹²⁹ Each Managing Agency also promised to continue to discharge its managing agency obligations in the ordinary way,¹³⁰ but also in such as way as gave effect to RRC 2.¹³¹ RRC 2 required Equitas Re to set the premium for each EquitasRe-reinsurance without obligation on the part of the Managing Agent¹³² but with the latter's cooperation.¹³³ Under RRC 2, the managing agency appointed Equitas Re as its sub-agent to

¹¹⁵ And see *SOD*, p.99-100:-

Under the Reinsurance Contract, Equitas Reinsurance will be reinsuring the 1992 and prior business as valued at 31 December 1995. Arrangements were therefore put in place with managing agents to provide Equitas Reinsurance with a degree of control in respect of 1992 and prior business. This control was achieved by the Supervisory Management Agreements and, more recently, the Information and Administration Agreements.

¹¹⁶ See for example the Corporation's then CEO's December 19, 1995 letter to all members' and managing agencies. Per *ibid.*, p.1, "First and foremost, Names should be assured that the Supervisory Management Agreement in no way commits Names to reinsure into Equitas ..."; but see *ibid.*, p.2: "[M]anaging agents are being asked to establish separate accounts for the 1992 and prior business which is to be reinsured into Equitas".

¹¹⁷ See for example Market Bulletin Y109, January 12, 1996 ("Equitas supervisory management agreement: disputes resolution panel").

¹¹⁸ See RRC 2, §10.1. Most provisions terminated on the Termination Date but some survived including those concerning responsibility for running off relevant business (§2) Segregated Accounts (§4) and confidentiality (§9): see *ibid.* for detailed provisions.

¹¹⁹ See RRC 4, recital (B) ("In contemplation of this Agreement, Managing Agents have entered into Supervisory Management Agreements...").

¹²⁰ RRC 2, §9.1 *et seq.*

¹²¹ See RRC 2, §§2.2, 2.8. Some matters required Equitas Re's prior written approval: see *ibid.*, §2.5.

¹²² RRC 2, §1.3.

¹²³ RRC 2, Sch. 1., §1.

¹²⁴ RRC 2, §1.7-§1.8.

¹²⁵ RRC 2, §1.7. On matters to be considered to have a material effect unless Equitas Re otherwise agreed, see *ibid.*, §1.8(a)-(d).

¹²⁶ RRC 2, §2.2; *q.v.* for detailed provisions.

¹²⁷ RRC 2, §2.3; *q.v.* for detailed provisions.

¹²⁸ RRC 2, §8.1.

¹²⁹ RRC 2, §2.5-§2.7. See *ibid.*, §2.5 for detailed provisions.

¹³⁰ RRC 2, §1.6: "The Managing Agent undertakes to Equitas [Re] and Lloyd's that the Managing Agent will continue to discharge its obligations as managing agent in accordance with the requirements of the Council, including, for the avoidance of doubt, the Reconstruction and Renewal Byelaw [Byelaw 22 of 1995] and any direction made thereunder, and in accordance with its duties to Names".

¹³¹ RRC 2, §2.8 ("... the Managing Agent undertakes ... to exercise [SUA 1 / SCA 1] power or comply with such duty or obligation *as restricted*, limited or otherwise affected under the terms of this Agreement"). Italics added.

¹³² RRC 2, §1.9: "Subject to the approval of the Council pursuant to the Reconstruction and Renewal Byelaw [Byelaw 22 of 1995], Equitas [Re] shall set the Syndicate Premium and the Managing Agent shall, subject to the earlier provisions of this clause 1 and clause 1.11, have no obligation regarding the setting of the Syndicate Premium". The "earlier provisions" dealt with the managing agency's specific promises (some of which are noted in the main text); *ibid.*, §1.11 (among other things) allowed the managing agency to continue to be involved in consultation in and to make representations to Equitas Re in setting a "proper level" of EquitasRe-reinsurance premium.

¹³³ RRC 2, §1.1:-

For the purpose of enabling Equitas to calculate the Syndicate Premium an the Council to direct the mandatory entry into the Equitas Reinsurance Contract and to effect the further implementation of the Reconstruction and Renewal Byelaw, the Managing Agent agrees to make available to Equitas [Re] and to Lloyd's, for the period from the date hereof to the Commencement Date, on request any information (including Confidential Information) relating to the Syndicate 1992 and Prior Business and to the business affairs of the Names insofar as they relate to that business.

Ibid., §1.1(a)-(d) gives examples of the sort of information to be provided. And see *ibid.*, §1.2-§1.5.

handle, adjust, settle and otherwise deal in every way (including in litigation) with “APH Claims”.¹³⁴ Any relevant deed of authority between the managing agency and the Corporation (delegating claims handling to the Corporation’s Specialist Claims Unit¹³⁵ was suspended.¹³⁶ Under RRC 2, the Corporation indemnified each signatory managing agency (including a members’ agency in relation to direct Members¹³⁷), and its officers, employees and agents, against liability for (for example): (1) the level of the EquitasRe-reinsurance premium;¹³⁸ (2) the managing agency entering into RRC 4 on behalf of relevant SYA participants;¹³⁹ (3) complying with any Council direction made under Byelaw 22 of 1995;¹⁴⁰ (4) any act or omission by Equitas Re in relation to Equitas Re’s handling of APH Claims.¹⁴¹ The indemnity does not cover: (1) breach of warranty by the managing agency;¹⁴² (2) liability further to a claim arising out of the managing agency’s, or its officers’, employees’ or agents’, negligent, reckless or dishonest failure to provide requested information.¹⁴³ Recognising the special responsibilities of and material adverse changes possibly arising during the caretaker period, each Managing Agent — still under duty of care obligations to each prospective EquitasRe-reinsured SYA participant — expressly consented to each such participant assigning to Equitas Re his rights of action against the Managing Agent for breach of duty of care in managing the SYA during that period.¹⁴⁴

Surplus means, in respect of any Syndicate, the amount, if any, of any surplus as shown as a release in the line entitled “shortfall/release” in the final reserve indication sent to that Syndicate in June 1996;

NOTE: for RRC 4 use, see *ibid.*, §7.3. “Surplus” is not to be confused with: (1) the “Surplus” in RRC 4, Sch. 2, §1’s definition of “Surplus Account”, below; (2) the “surplus” in *ibid.*’s definition of “Illinois Surplus Trust”; (3) the operating “surplus” to be distributed to EquitasRe-reinsured SYA participants discussed in *SOD*.

sent to that Syndicate: infelicitous: a syndicate properly so called cannot be and is not the recipient of anything. The recipients meant are the individual participants on the particular relevant SYA.

Surplus Account means in relation to a Syndicate, assets standing to the credit of a Premiums Trust Fund, LATF or LCTF representing a surplus;

NOTE: For RRC 4 use, see *ibid.*, §7.3; Sch. 2, §1 definition of “Return on Surplus”. Not presently relevant.

syndicate means a group of underwriting members of Lloyd’s, to which a particular number is assigned by or under the authority of the Council, for whose account an active underwriter accepted or accepts insurance business at Lloyd’s;

NOTE: For RRC 4 use, see *ibid.*, parties, “Underwriting members of Lloyd’s” (“Syndicates”); *ibid.* (“Closed Year Syndicates”); Sch. 2, §1 definition of “Centrewrite Reinsurance”, “Closed Year Syndicate”, “Syndicate”, “Syndicate 1992 and Prior Business”, “Syndicate List”, “Syndicate Reinsurances”. For the multiple defectiveness of the term and of various components of its definition, see the annotation to “Syndicate”, a materially different use of the same word.

Syndicate means each of the syndicate years of account listed in schedule 1 to this Agreement;

NOTE: For RRC 4 use, see *ibid.*, *passim*. It is also defined at RRC 4, parties, “Underwriting Members of Lloyd’s comprising the syndicates specified in schedule 1”. See the materially different use of “syndicate” in the RRC 4, Sch. 2, §1 definition immediately above. As used in RRC 4, the terms “syndicate”, “Syndicate” and “Closed Year Syndicate” are all multiply defective or otherwise infelicitous. For example: (1) a syndicate properly so called is neither a group of SYA participants (RRC 4, Sch. 2, §1 definition of “syndicate”; a syndicate is incapable of being a group) nor a YA (*ibid.*, definition of “Syndicate”; a syndicate properly so called is incapable of being a SYA) but an idea and a self-regulatory conceptual device; (2) “syndicate” and “SYA” are not synonymous or interchangeable; (3) “syndicate” as defined (SYA participants) is inconsistent with “Syndicate” as defined (a SYA): “SYA participants” and “SYA” are not synonymous. RRC 4’s draftsman also confuses SYAs with UYs.¹⁴⁵ If the draftsman wanted to refer to participants collectivised on a particular SYA as distinct from Members in their capacity as participants

¹³⁴ RRC 2, §6.1

¹³⁵ See for example RRC 2, §6.2.

¹³⁶ RRC 2, §6.2; see also RRC 4, §13.

¹³⁷ RRC 2, recital (F) and *ibid.*, §1.10.

¹³⁸ RRC 2, §1.10(a).

¹³⁹ RRC 2, §1.10(b).

¹⁴⁰ RRC 2, §1.10(c).

¹⁴¹ RRC 2, §1.10(e).

¹⁴² RRC 2, §1.10. For warranties, see *ibid.*, §1.4 (including, for example, that the managing agency has kept proper books and records, that it has used and will use reasonable care in complying with a request for information under *ibid.*, §1.1). And see *ibid.*, §1.5.

¹⁴³ RRC 2, §1.10.

¹⁴⁴ RRC 8, §1.1. The Managing Agent “accepts” that “the financial consequences of the Run-off of each [relevant SYA; “RRC 8 used “Syndicate”] will be for the account of [Equitas Re] from the Commencement Date since [Equitas Re] will have no ability to adjust the Syndicate premium of any Syndicate to reflect material events occurring, or of which it becomes aware, from the Commencement Date.”

¹⁴⁵ See p.205 *et seq.*

on any SYA, “stamp” is a serviceable term to do so; “syndicate” is not; (4) the virtually identical RRC 1, Sch. 1, §1, EATD, §1, and LATD, §1.28 definitions of “Syndicate” are materially different to the RRC 4, Sch. 2, §1 definition.

Syndicate 1992 and Prior Business means, in respect of any Syndicate or Closed Year Syndicate, all 1992 and Prior Business underwritten at Lloyd’s by Names or Closed Year Names as members of the Syndicate or Closed Year Syndicate (including as reinsurers under any contract of reinsurance to close of any syndicate year of account reinsured to close either directly or indirectly by the Syndicate) and/or where the Syndicate is a 1993 or later year of account syndicate any liabilities under contracts of insurance relating to 1992 and Prior Business reinsured to close into the 1993 or any later year of account;

NOTE: For RRC 4 use, see *ibid.*, recital (A), (C), (K), §§3.2, 3.2(b), 3.4, 3.4(e), 3.9, 3.11(a), (b), (c), 5.9, 6.15, 6.16, 9.2, 9.2(f), (t), 9.4(c), 10.2, 11.3, 12(b), 15.1, 15.3, 15.3(c), (d), 16; Sch. 2, §1 definition of “Assumed Liability”, “Books and Records”, “Names Debts”, “Other Returns”, “run-off”, “Segregated Account”, “Segregated Account Assets”.

reinsurers under any contract of reinsurance to close: error: reinsurance is not RTC.¹⁴⁶

any contract of reinsurance to close of any syndicate year of account: error for “any contract of reinsurance to close of the participants on any SYA” — otherwise, a rare correct use of “year of account”.

Syndicate List means, in respect of each Syndicate and Closed Year Syndicate, (a) the last schedule prepared in respect of that Syndicate or Closed Year Syndicate specifying the Names who were members of that Syndicate or Closed Year Syndicate, the members syndicate premium limit of each such member of that Syndicate or Closed Year Syndicate, the basis and level of the managing agent’s remuneration and containing such other particulars as may for the time being be required by the Council, and (b) for any purpose other than the calculation or allocation of consideration or rights under clause 8 of this Agreement, any other such schedule or document certified by Lloyd’s and showing any other member as having participated on that Syndicate or Closed Year Syndicate;

NOTE: For RRC 4 use, see *ibid.*, §§5.1(b)(i), (ii), 8(b); Sch. 2, §1 definition of “Names”.¹⁴⁷

last schedule: *cf.* the various other schedules prepared by the managing agency before the SYA’s stamp is finalised. Traditionally, a managing agency wishing to bud in the next UY a YA of a particular syndicate would compile a “provisional” list of participants. The managing agency would do that in or by the last quarter of the preceding UY, which would coincide with that of the first YOR of that syndicate’s immediately preceding YA. The participants on the latter would be the prime candidates for recruitment to participation on the former (notwithstanding the considerable blind spot as to the eventual relevant audited results of the participants on the current SYA). By such contiguous participation, the Member had the impression that he was a “member” of the “syndicate”; contiguity also enabled him to appear to “chase his losses”. The final list of participants on a particular SYA would be drawn up by the managing agency in or around the first quarter of that YA’s first YOR and would take into account last-minute second thoughts permitted by the managing agency, and recent deaths.

Syndicate Loan means the benefit of any loan made from funds held in a Premiums Trust Fund, LATF or LCTF in respect of 1992 and Prior Business attributable to a Segregated Account;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of “Segregated Account Assets”; Sch. 4, §1.5. PTF and LATF are personal-use funds.

Syndicate Premium means, in respect of any Syndicate, any positive amount shown in the column headed Syndicate Premium in schedule 1;

NOTE: For RRC 4 use, see *ibid.*, recital (E), (K), §§5.1(b)(i), 5.10, 7.2. For RRC 4 use of “syndicate premium”, see *ibid.*, Sch. 2, §1 definition of “Syndicate List”.

Syndicate Reinsurances means, in respect of any Syndicate or Closed Year Syndicate, those reinsurance contracts (excluding this Agreement and the reinsurance to close of any Closed Year Syndicate) taken out by the Syndicate or Closed Year Syndicate and those which enure to the benefit of the Syndicate taken out by any other syndicates or any Closed Year Syndicate reinsured to close, either directly or indirectly, by the Syndicate (or otherwise in respect of 1992 and Prior Business) but excluding any claim, right, title, benefit or interest under personal stop loss, estate protection reinsurance and individual run-off policies purchased on behalf of any Name for his own account;

NOTE: For RRC 4 use, see *ibid.*, §§3.2(a), 6.1 heading, 6.1, 6.3, 6.4, 6.5, 6.11, 6.12, 6.13; Sch. 2, §1 definition of “Other Returns”, “Segregated Account Receivables”.

in respect of any Syndicate: *viz.*, such outward reinsurance as each of the participants on the same particular SYA happens collectively to buy for his own¹⁴⁸ account through their mutual managing agency. *Cf.* such PS LI as a Member happens individually

¹⁴⁶ See p.207.

¹⁴⁷ See incidentally *P & B (Run-Off) Ltd. v Woolley* [2002] 1 All ER (Comm) 577 (CA).

¹⁴⁸ On set-off, see p.75.

to buy (traditionally through his members' agency) in relation to liabilities incurred by him as a participant on particular SYAs.¹⁴⁹

or Closed Year Syndicate: irrelevant: each conventionally outward-RTCed SYA participant has already transferred¹⁵⁰ to the inward-RTCing SYA participant his outward reinsurance recoveries.

excluding ... reinsurance to close: a *non sequitur*: reinsurance and RTC are materially different products.¹⁵¹

to the benefit of the Syndicate: viz., It should not be understood, by the defective use of "Syndicate", that outward reinsurance benefits anyone other than the particular participants on the particular relevant SYA.

Terms and Conditions means the terms and conditions of the Settlement Offer as set out in Appendix 2 to the Settlement Offer Document, and any revision or amendment thereof;

NOTE: For RRC 4 use, see *ibid.*, §5.6(a). For RRC 4 use of "terms and conditions", see *ibid.*, recital (A), §3.1.

Transferred Rights has the meaning set out in paragraph 1.3(g) of schedule 4;

NOTE: For RRC 4 use, see *ibid.*, Sch. 4, §§1.4(f), (g)(i)-(vi), (h), (j), (k).

Trigger Event has the meaning set out in the Retrocession Agreement;

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, 61 definition of "Adjustment Entitlement", "Automatic Reinsurance Trigger Event", "Certified Trigger Event", "Reinsurance Trigger Event"; Sch. 3, §2.1(c). Cf. RRC 5, Sch. 3, §17 definitions "Automatic Trigger Event" and "Certified Trigger Event". Cf. the erroneous (because not defined) RRC 5, §2.4 "Automatic Retrocession Trigger Event" and "Certified Retrocession Trigger Event".

[*Trustee* is defined at RRC 4, parties, "EQUITAS POLICYHOLDERS TRUSTEE" — *Ed.*]

US\$ or US Dollars means the lawful currency of the United States of America;

NOTE: For RRC 4 use of "US\$", see *ibid.*, §18; Sch. 4, §1.3. For RRC 4 use of "US Dollars", see *ibid.*, §18. The other two relevant currencies are pounds and Canadian dollars. See RRC 4, Sch. 2, §1 definition of "Can\$".

US Trust Assets means the aggregate of the assets in the EATF and such amounts, if any, as are held in the LATF and are available only for the discharge of 1992 and Prior Business (excluding, for the avoidance of doubt, the Illinois Trust Fund); and

NOTE: For RRC 4 use, see *ibid.*, Sch. 2, §1 definition of "Dedicated Assets", "US Trust Rate"; Sch. 3, §5.1(a).

only: the EATF by implication does cover only 1992 and Prior Business. The LATD does not expressly or impliedly cover *only* such liabilities.

US Trust Rate means the rate at which liabilities applicable to American Business (excluding for this purpose Illinois Retained Business) may be discharged from US Trust Assets alone.

NOTE: For RRC 4 use, see *ibid.*, Sch. 3, §6.1(a)(ii), (b), (c), (d).

from US Trust Assets alone: the issue is not the discharge of American Business but the discharge (if any) of such liabilities solely from such EATF and or LATF assets as are available only for that purpose.

¹⁴⁹ Traditionally sold to him by other SYA participants, with recourse in default to the Central Fund, funded by Members generally — an incestuous spiral indeed, of which the managing agencies of participants on YAs of (for example) syndicates 387, 134 and 184 were particularly adept.

¹⁵⁰ The conventional RTC contract at *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd's Law Rep. 618, 622 (Potter J) is not untypical of pre-R&R vintage:-

IN CONSIDERATION of the payment to us of a sum of ... the receipt of which amount we hereby acknowledge, we hereby undertake each for his own part and not one for another, to pay and make good in the proportions shown below against our respective Names all Claims, Returns, Reinsurance Premiums and the like taken down on and after 1st January 1982, against the 1979 Underwriting Account of Syndicate ... PROVIDED ALWAYS that there shall be paid to and retained by us all Premiums, Salvages, Refunds and Reinsurance Recoveries which may be taken down on behalf of the Reassured Account on and after the 1st January 1982.

¹⁵¹ See p.207 *et seq.*

2. In this Agreement of which this schedule 2 forms part, save where the context requires otherwise:
 - (a) references to any part, clause, sub-clause, schedule or paragraph without further designation shall be construed as a reference to the part, clause, sub-clause, schedule or paragraph to or of this Agreement so numbered and the schedules form part of and are deemed to be incorporated in this Agreement;
 - (b) part, clause, sub-clause and schedule headings are for convenience only and shall not be taken into account in the interpretation of this Agreement;
 - (c) reference to any Act, statute, statutory provision or byelaw (including any Lloyd's byelaw) shall include a reference to that provision as amended, re-enacted or replaced from time to time whether before or after the date of this Agreement and any former statutory provision replaced (with or without modification) by the provision referred to;

Lloyd's byelaw: cf. RRC 4, Sch. 2, §2(c)'s equivalent at for example RRC 7, §1.2(c), which, though RRC 7 expressly refers to byelaws, does not make the same attempt to bind RRC 7 parties to their future versions. The notion may be problematic. Unlike statutes, Lloyd's byelaws are binding only in contract. The traditional way of binding a natural Member to the totality of current byelaws has been the short-form General Undertaking. In contrast, RRC 4 contains no general consent to or acknowledgment of any part of the self-regulatory regime at Lloyd's, so far as it applies to byelaws, this provision is extremely wide, if it is not invalid (including for vagueness, especially "that provision"). Any byelaw which any relevant party claimed was contractually binding on a RRC 4 party would require close scrutiny for compliance with this provision. Since RRC 4's execution, the FSA has acquired a regulatory role at Lloyd's¹⁵² and presumably would have a relevant material role in the byelaw's formulation and promulgation.
 - (d) words incorporated the masculine gender only include the feminine and neuter genders and words including the singular number only include the plural and vice versa;
 - (e) reference to any party hereto or any person shall include a reference to any successor or assignee of such party or other person;
 - (f) reference to:
 - (i) a member of Lloyd's includes a former member of Lloyd's;

NOTE: the premise is flawed and raises jurisdictional issues.¹⁵³
 - (ii) a former member of Lloyd's includes a member who has died or, as the context may require, the estate or personal representatives of such a member; and

NOTE: infelicitous: (1) since death does not terminate Membership, a merely dead Member cannot be a former Member (he continues to be a Member through his personal representative(s)); (2) inconsistent with RRC 4, Sch. 2, §2(f)(iii), which includes personal representatives in relation to current Members.
 - (iii) a member of Lloyd's includes reference to any administrator, administrative receiver, committee, curator bonis, executor, liquidator, manager, personal representative, supervisor or trustee in bankruptcy, or any other person entitled or bound to administer the affairs of the member concerned;

NOTE: infelicitous in not distinguishing between surrogates of a current Member (for example, executors) and of a former Member (for example, trustee in bankruptcy). Some roles mentioned are not appropriate to natural Members at all, at least in English law (for example, a liquidator: English law does not recognise the concept of a liquidator for the estate of a bankrupt natural person).
 - (g) reference to:
 - (i) a managing agent includes a substitute agent appointed to perform any of the functions of a managing agent; and
 - (ii) a members' agent includes a substitute agent appointed to carry out any of the functions of a members' agent;
 - (h) references to documents include any agreement (including this Agreement), negotiable instrument, certificates, notice or other document of any kind and references to any document (or a provision

¹⁵² See generally Financial Services and Markets Act 2000, Part XIX, and FSA Lloyd's Rulebook.

¹⁵³ See Astor's Law of Lloyd's, 2nd Ed. on the duration of the Council's self-regulatory jurisdiction.

thereof) shall be construed as a reference to that document (or provision) as from time to time amended, supplemented, varied or replaced (in whole or in part); and

- (i) the agreed form in relation to any document means the form agreed between ERL and the Substitute Agent and for the purposes of identification only initialled by or on behalf of the signatories to this Agreement.

SCHEDULE 3 — OPERATION OF PROPORTIONATE COVER

NOTE: see generally the closely similar RRC 4, Sch. 3. RRC 4, Sch. 3 is a device permitting — but only as between RRC parties — Equitas Re to pay less than 100% of its liabilities. Three categories of creditor are involved: (1) EquitasRe-reinsured SYA participants; (2) “Insurance Creditors”; (3) “General Creditors”.

Proportionate Cover Plans

1. The introduction of a Proportionate Cover Plan and the administration of any such plan, introduced pursuant to the provisions of clause 3.5 of the Agreement, shall be governed by the following provisions of this schedule.

NOTE: the extent to which RRC 4, Sch. 3 is binding on an EquitasRe-assured-at-Lloyd’s — especially given RRC 4, §3.7 — will be controversial. On severability of all or part of RRC 4, Sch. 3 etc., see RRC 4, §21. See similarly RRC 5, Sch. 3, §1.

Reinsurance Trigger Events

NOTE: see RRC 5, Sch. 3, §2.

- 2.1 The circumstances described in clause 3.5 of the Agreement as Certified Reinsurance Trigger Events are:

NOTE: See RRC 5, Sch. 3, §2.1. No RRC 4, Sch. 3, §2.1(a)-(c) Certified Reinsurance Trigger Event is in itself a RRC 7, §2.15 “Insolvency Event”. On the contrary, each such Event may have the effect of protecting Equitas Re from what would otherwise be a RRC 7, §2.15(c) “Insolvency Event”. And see RRC 4, Sch. 3, §9. Following a Certified Reinsurance Trigger Event, Equitas Re is required to adjust its liabilities (see *ibid.*, Sch. 3, §3.1), and that adjustment then takes effect in accordance with *ibid.*, Sch. 3, §3.2. But despite *ibid.*, Sch. 2, §1’s definition of “Proportionate Cover Plan”, a further stage appears to remain before such a plan comes into existence, *viz.*, “implementation” under *ibid.*, §5.1.

- (a) at any time when a Proportionate Cover Plan is not in force, the making of a determination by the Board of ERL that, if the provisions of this part of this schedule were not invoked, the Relevant Original Liabilities of ERL (taking into account, for the avoidance of doubt, its prospective and contingent liabilities and having made provision for the discharge of the General Creditors of ERL in full in making such determination) would exceed the value of its Relevant Available Assets;

NOTE: see RRC 5, Sch. 3, §2.1(a).

in force: *cf.* RRC 4, §2.1(b) and RRC 5, §2.1(b) “in effect”.

the Relevant Original Liabilities of ERL ... would exceed the value of its Relevant Available Assets: inherent in the computation is Equitas Re’s RRC 4, Sch. 3, §12 obligation to pay General Creditors in full. Presumably a RRC 4, Sch. 3, §8.1 event would precipitate a Certified Reinsurance Trigger Event.

- (b) at any time when a Proportionate Cover Plan is in effect, the making of a determination by the Board of ERL that, based on a current Proportionate Cover Rate, the Relevant Original Liabilities of ERL (taking into account, for the avoidance of doubt, its prospective and contingent liabilities and the Proportionate Cover Rate then in force and having made provision for the discharge of the General Creditors of ERL in full in making such determination) would exceed the value of its Relevant Available Assets; or

NOTE: see RRC 5, Sch. 3, §2.1(b). Read with RRC 4, Sch. 3, §3.2, this allows and requires Equitas Re to determine multiple successive *ibid.*, Sch. 3, §6 proportionate cover rates; and see *ibid.*, Sch. 3, §4.

in effect: *cf.* RRC 4, §2.1(a) and RRC 5, §2.1(a) “in force”.

- (c) receipt by ERL of a notice from Equitas that a Trigger Event (as defined in the Retrocession Agreement) has occurred.

a notice from Equitas: no special form is prescribed. There is no express requirement that it be public or be served on the FSA (unless the latter requirement be in the apparently-not-public DTI notices of requirements or their FSA successors). Since Equi-

tas Re wholly owns Equitas Ltd. and has directors in common, presumably such a notice is a matter of form rather than substance.

Trigger Event: The term “Trigger Event” *simpliciter* is not used in RRC 5, Sch. 3. Presumably either a RRC 5, Sch. 3, §2.1 “Certified Trigger Event” or an *ibid.*, Sch. 3, §2.3 “Automatic Trigger Event” is meant. *Cf.* Equitas Re being on notice further to RRC 4, Sch. 3, §8.1 that Equitas Ltd. is: (1) to take any action with a view to promoting a scheme of arrangement (§8.1(a)); (2) to take any action with a view to its own winding up (*ibid.*, §8.1(b)). This is duplicative to the extent of a RRC 5, Sch. 3, §2.3(a) or (b) Automatic Trigger Event (a resolution voluntarily winding up Equitas Ltd. or an order compulsorily winding it up); (3) to exercise various specified rights (see *ibid.*, (§8.1(c)).

- 2.2 For the purposes of paragraph 2.1, the Board of ERL shall be entitled to assume that the Relevant Available Assets shall be valued on the assumption that ERL remains a going concern.

NOTE: see RRC 5, Sch. 3, §2.2.

- 2.3 The circumstances described in clause 3.5 of the Agreement as Automatic Reinsurance Trigger Events are:-

NOTE: this should be read with RRC 4, §3.5 and *ibid.*, Sch. 3, §10.1. All three events are types of liquidation. Any of the three results in the EATD being deemed “inadequate”: EATD, §12(a)(1). On other insolvency processes such as Companies Act 1985, s.425 scheme of arrangement, etc., see for example RRC 4, Sch. 3, §8.1.

- (a) the passing of a resolution for the voluntary winding up of ERL;

NOTE: this event also happens to be a RRC 7, §2.15(b) Insolvency Event upon the occurrence of which Equitas Policyholders Trustee’s RRC 7, §2.4 etc. obligations and functions are triggered: for example, Equitas Policyholders Trustee proves in Equitas Re’s liquidation under RRC 7, §2.4 and 2.6; extracts relevant assets from Equitas Re’s liquidator; and then distributes those assets to RRC 7 Insurance Creditors in accordance with RRC 7, §2.5 etc.

passing: *viz.*, by Equitas Holdings, Equitas Re’s only member. The precipitating event may be Equitas Re being put on notice that Equitas Ltd.’s member is doing likewise: see RRC 4, Sch. 3, §8.1(b).

a resolution: *viz.*, (1) a resolution under Insolvency Act 1986, s.84(1)(b) (solvent company’s members’ voluntary special resolution¹⁵⁴); (2) a resolution under *ibid.*, s.84(1)(c) (insolvent company’s members’ voluntary extraordinary resolution¹⁵⁵). The liquidation is deemed to begin on the resolution being passed.¹⁵⁶

- (b) the making of an order for the compulsory winding up of ERL; or

NOTE: see the Note to RRC 4, Sch. 3, §2.3(a).

making: the precipitating event may be an application consequent on Equitas Re being put on notice of similar activity at Equitas Ltd.: see RRC 4, Sch. 3, §8.1, including *ibid.*, §(b).

an order: *viz.*, an order by the court under Insolvency Act 1986, s.125 etc. *Cf.* Equitas Policyholders Trustee’s RRC 7, §2.4 power to petition for such an order.

- (c) the appointment of a provisional liquidator in respect of ERL.

the appointment: *viz.*, an appointment under Insolvency Act 1986, s.135.

- 2.4 On the occurrence of a Certified Reinsurance Trigger Event, or upon the Board of ERL becoming aware of facts or circumstances which it considers makes the occurrence of a Certified Reinsurance Trigger Event likely, the Board of ERL shall be entitled, but not obliged, to consult with Insurance Creditors, or any part of them, or representatives of such Insurance Creditors, or any part of them, as the Board of ERL may see fit, in connection with the setting of a Proportionate Cover Rate, the suspension of payments, or such other matters as the Board of ERL may in its sole discretion determine.

NOTE: see RRC 5, Sch. 3, §2.4.

occurrence: *viz.*, the happening of any of the events at RRC 4, Sch. 3, §2.1(a) (making of a determination), *ibid.*, (b) (making of a determination), (c) (receipt of a notice). And see *ibid.*, Sch. 2, §1 definition of “Interim Proportionate Cover Declaration”.

Effect of Proportionate Cover

- 3.1 On the occurrence of a Reinsurance Trigger Event, the liabilities of ERL to the Reinsured Parties (or their successors in title) in respect of the Reinsurance Indemnities shall be adjusted in such a manner that they are equal to the aggregate of:

¹⁵⁴ Precipitating the “members’ voluntary winding up”: Insolvency Act 1986, s.90. See generally *ibid.*, Ch. III.

¹⁵⁵ Precipitating the “creditors’ voluntary winding up”: Insolvency Act 1986, s.90; see generally *ibid.*, Ch. IV. “Creditors” is infelicitous: there is no Insolvency Act 1986 or other provision enabling any creditor as such to resolve to wind up anything.

¹⁵⁶ Insolvency Act 1986, s.86.

NOTE: see RRC 5, Sch. 3, §3.1. RRC 4, Sch. 3, 63.1 is to be read with RRC 4, §3.5. Although it does not expressly say so (especially confusing when read with *ibid.*, §5.1 — presumably it is mere bad drafting), RRC 4, Sch. 3, §3.1 describes a Proportionate Cover Plan. A Proportionate Cover Plan is a device whereby Equitas Re contractually recalculates its RRC 4, §3 liabilities to EquitasRe-reinsured SYA participants — a process of questionable financial relevance to an EquitasRe-assured-at-Lloyd's who does not settle with relevant EquitasRe-reinsured SYA participants.

On: presumably “On or within a reasonable time after”, or “Following”. Otherwise, in the case of an Automatic Reinsurance Trigger Event, Equitas Re would have to determine a Proportionate Cover Rate instantaneously. In the case of a Certified Reinsurance Trigger Event, presumably Equitas Re will have given itself time to consider the position. “On” does not mean “as at”: for the effective dates of the adjustment, see RRC 4, Sch. 3, §§3.2 and 3.3.

a Reinsurance Trigger Event: *viz.*, either a RRC 4, Sch. 3, §2.1 Certified Reinsurance Trigger Event or an *ibid.*, Sch. 3, §2.3 Automatic Reinsurance Trigger Event: no distinction is drawn between the two types of Event — misleadingly: see *ibid.*, Sch. 3, §5.1 and RRC 7, §2.15(b) and (c) which does purport to draw a distinction. The drafting appears to be defective. RRC 4, Sch. 3, §3.2 governs the effective date of a Certified Reinsurance Trigger Event adjustment. *Ibid.*, Sch. 3, §3.3 governs the effective date of an Automatic Reinsurance Trigger Event adjustment.

Reinsured Parties: *cf.* RRC 4, Sch. 3, §10.1 (“Names”).

shall: subject to the overriding discretion at RRC 4, Sch. 3, §8.2 (*cf. ibid.*, Sch. 3, §5.1) — and see RRC 4, §3.5’s proviso — adjustment is compulsory, not discretionary. Only the RRC 4, Sch. 3, §6 rates are discretionary. The requirement to adjust applies to either of the two types of Reinsurance Trigger Event.

be: *viz.*, by Equitas Re’s board in the case of a Certified Reinsurance Trigger Event; presumably by the appropriate official following an Automatic Reinsurance Trigger Event.

adjusted: adjustment is the essence of a Proportionate Cover Plan: see RRC 4, Sch. 2, §1’s definition of Proportionate Cover Plan. It follows that mere adjustment under this clause necessarily constitutes a Proportionate Cover Plan. But see *ibid.*, Sch. 3, §5.1, which appears to draw a distinction — emphatically absent from *ibid.*, Sch. 3, §3.1 — between a Certified and an Automatic Reinsurance Trigger Event. Equitas Re promises that it will decide (to the extent that it has any discretion in the matter) “bona fide” to adjust its RRC 4, §3 reinsurance liabilities and that all reasonable skill, care and diligence will be “taken” in deciding whether to adjust: see RRC 4, §3.6.

that they are: *viz.*, that, from the juncture prescribed at RRC 4, Sch. 3, §3.2 (adjustment following a Certified Reinsurance Trigger Event) or *ibid.*, §3.3 (adjustment following an Automatic Reinsurance Trigger Event), they actually are, not merely deemed to be — for all purposes including all relevant supervening insolvency processes: including liquidation (see RRC 4, Sch. 3, §§10.1) and Companies Act 1985, s.425 scheme of arrangement (see *ibid.*, Sch. 3, §11).

- (i) the Original Liability multiplied by the Proportionate Cover Rate, as calculated in accordance with paragraph 6 of this schedule; and

Proportionate Cover Rate: the Proportionate Cover Rate determines the adjustment inherent in a Proportionate Cover Plan. On setting the Proportionate Cover Rate, see RRC 4, Sch. 3, §6.1 *et seq.*

- (ii) the relevant Adjustment Entitlement (if any).

Adjustment Entitlement: RRC 4, Sch. 3, §3.1(ii) applies only in the event of an upward adjustment of a Retrocession Rate: see *ibid.*, Sch. 2, §1 definition of “Adjustment Entitlement”. On upwards adjustments, see RRC 4, Sch. 3, §13.

- 3.2 Any adjustment pursuant to the occurrence of a Certified Reinsurance Trigger Event shall take effect on and with effect from the date specified in the relevant Interim Proportionate Cover Declaration which shall be issued by ERL promptly following the occurrence of a Certified Reinsurance Trigger Event.

Any: *viz.*, any of the more than one adjustments permitted under RRC 4, Sch. 3, §4. “Any” is otherwise infelicitous given that *ibid.*, Sch. 3, §3.1 makes adjustment compulsory.

adjustment: *viz.* the adjustment already made pursuant to the requirement at RRC 4, Sch. 3, §3.1.

Interim Proportionate Cover Declaration: on the final Proportionate Cover Declaration, see RRC 4, Sch. 3, §7.

- 3.3 Any adjustment pursuant to the occurrence of an Automatic Reinsurance Trigger Event shall take effect on and with effect from, as the case may be:

Any adjustment: see relevant annotations at RRC 4, Sch. 3, §3.2.

on: not “as at”, compounding the confusion as to RRC 4, Sch. 3, §5.1’s apparently further stage of “implementation”.

- (i) the date of the resolution for the voluntary winding up of ERL;
- (ii) the date of the order for the compulsory winding up of ERL; or

NOTE: that is, Equitas Re enters liquidation with its RRC 4, §3 liabilities already recalculated as required, and in accordance with the process prescribed, by *ibid.*, Sch. 3, §3.1.

- (iii) the date of the appointment of a provisional liquidator in respect of EL.

NOTE: see RRC 4, Sch. 3, §10.1.

Plan may be invoked more than once

4. The provisions of clause 3.5 of the Agreement and this schedule 3 may be invoked more than once and appropriate adjustments (upwards or downwards) to any Proportionate Cover Plan then in effect made on each occasion provided (for the avoidance of doubt) that no Proportionate Cover Plan shall provide for the payment of any liability of ERL at a rate in excess of 100%.

NOTE: cf. RRC 4, Sch. 2, §1 definition of “Original Liability”. And see similarly *ibid.*, Sch. 3, §2.1(b).

be: viz., by Equitas Re’s board in the case of adjustment following a Certified Reinsurance Trigger Event; presumably by the liquidator or similar official following an Automatic Reinsurance Trigger Event.

upwards: presumably not in the case of a Certified Reinsurance Trigger Event, where adjustment is made only where relevant liabilities exceed relevant assets: see RRC 4, Sch. 3, §(2.1(a) and (b)). On upwards adjustments, see RRC 4, Sch. 3, §13.

in excess of 100%: Equitas Re as the relevant EquitasRe-reinsured SYA participant’s RRC 4, §9 run-off agent (rather than as RRC 4, §3 principal) paying more than 100% of a liability would presumably contravene RRC 4, §10.1.

Implementation of Proportionate Cover Plan

- 5.1 If a Certified Reinsurance Trigger Event occurs ERL shall, subject to paragraph 8, implement a Proportionate Cover Plan or, as the case may be, adjust a Proportionate Cover Rate of a Proportionate Cover Plan then in effect. For this purpose, ERL shall without undue delay determine as of the Record Date:

Certified Reinsurance Trigger Event: cf. a RRC 4, Sch. 3, §2.3 Automatic Reinsurance Trigger Event, where the *ibid.* Sch. 3, §3.1 adjustment, having taken effect under *ibid.*, Sch. 3, §3.3, is infiltrated into the liquidation or provisional liquidation rather than administered by Equitas Re as an insolvency official’s surrogate: see *ibid.*, Sch. 3, §10.1. Ditto in the case of a Companies Act 1985, s.425 scheme of arrangement: *ibid.*, Sch. 3, §11.

If a Certified Reinsurance Trigger Event occurs ERL shall ... implement a Proportionate Cover Plan: on first reading, this is repetitive of RRC 4, Sch. 3, §3.1 read with RRC 4, Sch. 2, §1’s definition of “Proportionate Cover Plan”: it is not clear what “implementation” adds to the already made RRC 4, Sch. 3, §3.1 compulsory adjustment — adjustment being the sole active ingredient of a Proportionate Cover Plan — *a fortiori* where the adjustment has already taken effect under *ibid.*, Sch. 3, §3.2. The drafting scheme and *ibid.* Sch. 2, §1’s definition of Proportionate Cover Plan are infelicitous.

subject to paragraph 8: this qualification presumably applies only where the Certified Reinsurance Trigger Event is either: (1) *per* RRC 4, Sch. 3, §2.1(a) or (b); or (2) *per ibid.*, Sch. 3, §2.1(c), a RRC 5, Sch. 3, §2.1(a) or (b) Certified, or *ibid.*, §2.3(c) Automatic Trigger Event. If it was either a RRC 5, Sch. 3, §2.3(a) or (b) Automatic Trigger Event, Equitas Ltd. would already be in liquidation.

- (a) the value of the Available Assets and, separately, the value of the US Trust Assets, the ECTF Assets and the Australian Custody Assets, respectively;
- (b) the amount of the Original Liabilities and, separately, the amount of the Relevant Original Liabilities applicable to American Business, Canadian Business, Australian Business and Residual Business, respectively (adjusted to reflect any Proportionate Cover Rate already in force, if relevant); and

NOTE: see *SOD*, p.99.¹⁵⁷

- (c) the amount owing to General Creditors,

NOTE: see generally RRC 4, Sch. 3, §12.

together with such other determinations as ERL shall consider appropriate.

- 5.2 ERL shall, in the absence of manifest error, be entitled to rely upon any certificate or other evidence supplied by Equitas, for the purpose of making any valuation or determination referred to in paragraph 5.1.
- 5.3 For the avoidance of doubt, ERL shall only be entitled to implement or adjust, as the case may be, a Proportionate Cover Plan in respect of all, and not part only, of the Reinsurance Indemnities in force at the relevant time.

NOTE: see RRC 4, §3.5 proviso.

¹⁵⁷ *SOD*, p.99:-

Assets supporting US dollar business and business in certain other jurisdictions will be held subject to separate trusts. Accordingly, Equitas will need separately to value the assets and estimate the liabilities for each of these categories of business. It will then set an appropriate proportionate cover pay-out rate for each of the relevant categories of business. If, in the opinion of Equitas, any existing pay-out rate becomes inappropriate, Equitas would be able to increase or reduce the pay-out rate accordingly.

Setting Proportionate Cover Rate

NOTE: see RRC 5, Sch. 3, §6.

- 6.1 The Proportionate Cover Rates applicable to American Business, Canadian Business, Australian Business and Residual Business as the case may be, shall be calculated in accordance with the following principles:

NOTE: and see RRC 4, Sch. 3, §10.1. See *SOD*, App. 5, §1.6 (p.2): Assets supporting US Dollar and Canadian business (and business in other jurisdictions) will be held subject to separate dedicated trusts. Accordingly Equitas will need separately to value the assets and estimate the liabilities for each of these categories of business. It will then set an appropriate proportionate cover pay-out rate for each of the relevant categories of business.

- (a) The following rates shall be calculated:-

(i) Residual Business Rate;

(ii) US Trust Rate;

NOTE: if Equitas Re determines a US Trust Rate of less than 100%, the EATD automatically becomes “inadequate”, and the NYID becomes entitled to take steps to seize the EATF: EATD, §12(a)(4)(a); *ibid.*, §12(c) *et seq.* See the corresponding provision in not-insolvent circumstances at RRC 4, §3.4(a). The US Trust Rate being less than 100% appears to be (subject to the construction of “US Trust Rate”) one of three all-must-be-satisfied preconditions to the LATD being deemed “inadequate” under *ibid.*, §18.1(b).

(iii) ECTF Rate; and

NOTE: *cf.* the corresponding provision in not-insolvent circumstances at RRC 4, §3.4(b).

(iv) (if applicable) the Australian Rate.

- (b) where all of the US Trust Rate, ECTF Trust Rate and Australian Rate are higher than the Residual Business Rate, then the rates calculated in accordance with paragraph 6.1(a) shall be the Proportionate Cover Rate applicable to the Residual Business, American Business, Canadian Business and Australian Business respectively;
- (c) where some, but not all, of the US Trust Rate, ECTF Trust Rate and Australian Rate are higher than the Residual Business Rate, then the relevant higher rate or rates shall be the Proportionate Cover Rate applicable to the American Business, Canadian Business or Australian Business, as the case may be;
- (d) subject always to sub-paragraph (c) above, where all or any of the US Trust Rate, ECTF Trust Rate and Australian Rate is lower than the Residual Business Rate, then the rate or rates which is lower shall be adjusted upwards and the Residual Business Rate will be adjusted downwards (by calculating the weighted average of the Residual Business Rate and such lower rate or rates) until such lower rate or rates and the Residual Business Rate have been equalised into a single rate which rate shall be the Proportionate Cover Rate applicable to those classes of business only.

- 6.2 Where ERL is satisfied that, in any particular jurisdiction, insurance creditors will be paid from a fund of assets only available to pay such creditors (whether held on trust or otherwise), ERL shall be entitled to take this into account in calculating the Residual Business Rate including, where necessary, calculating an additional specific rate or rates applicable to such jurisdictions consistent with the principles set out in paragraph 6.1 above.

insurance creditors: presumably error for “Insurance Creditors”.

a fund of assets only available to pay such creditors: for example, the EATF,¹⁵⁸ ECTF, etc. The generic (FSA-envisaged) Central Fund (ignoring for this purpose the Council’s purported use restrictions in the New Central Fund) is not such a fund since it is probably available to pay all assureds-at-Lloyd’s rather than any one or more particular assureds-at-Lloyd’s.

or otherwise: *viz.*, for example, to the extent seized by external insurance regulators: see for example RRC 4, §3.8.

- 6.3 For the avoidance of doubt, the Board of ERL shall be entitled to consult with such regulatory authorities as it considers appropriate with a view to implementing a Proportionate Cover Plan and

¹⁵⁸ See for example *SOD*, p.101, describing the EATF: “These assets will not be available to meet other liabilities of Equitas that do not fall within the purposes of the trust, such as liabilities from other jurisdictions. Consequently, it is conceivable that Equitas would have an overall surplus in one or more of these currencies/jurisdictions but would nonetheless be unable to pay certain claims in other currencies/jurisdictions as they fall due.”

any revision thereto and, in particular, ensuring that Dedicated Assets are applied in the manner and at the rate contemplated by the Proportionate Cover Plan and not otherwise.

such regulatory authorities as it considers appropriate: the NYID will be among the first to take an interest in Equitas Re's financial insufficiency: see for example EATD, §12(a)(4)(a).

Declaration of Proportionate Cover Rates

7. Following the determination by ERL of the Proportionate Cover Rate or Rates in accordance with paragraph 6, ERL shall promptly issue a Proportionate Cover Declaration.

NOTE: see RRC 5, Sch. 3, §7. On the Interim Proportionate Cover Declaration, see RRC 4, Sch. 3, §3.2.

Alternative Remedies

NOTE: see RRC 5, Sch. 3, §8. Despite "Alternative" in the heading, this provision appears to be without prejudice to Equitas Re's RRC 4, §3.5 and *ibid.*, Sch. 3, §3.1 adjustment *obligation*: clause headings do not affect interpretation: RRC 4, Sch. 2, §2(b). Presumably a RRC 4, Sch. 3, §8.1 event would in any event precipitate an *ibid.*, Sch. 3, §2.1 Certified Reinsurance Trigger Event, which would activate Equitas Re's *ibid.*, Sch. 3, §3.1 obligation to adjust its liabilities. Were Equitas Re to emulate Equitas Ltd. by undergoing any of the insolvency processes mentioned in RRC 4, Sch. 3, §8.1, it would presumably be on the basis (on the same lines as *ibid.*, Sch. 3, §3.3) of Equitas Re's liabilities as then adjusted.

- 8.1 If ERL is put on notice that Equitas is:

put on notice: *viz.*, in the case of §8.1(b) below, presumably before consummated into a RRC 5, Sch. 3, §2.3(a) or (b) Certified Trigger Event (otherwise to that extent RRC 4, Sch. 3, §2.1(c) is otiose).

- (a) to take any action with a view to promoting a scheme of arrangement under section 425 of the Companies Act 1985 or a voluntary arrangement under Part I of the Insolvency Act 1986;

NOTE: as for Equitas Re itself (rather than Equitas Ltd.) proposing a s.425 scheme of arrangement, see RRC 4, Sch. 3, §11. Implementing a Companies Act 1985, s.425 scheme of arrangement is not and does not of itself precipitate an Automatic Reinsurance Trigger Event.

to take any action: see RRC 5, Sch. 3, §8.1(a).

- (b) to take any action with a view to the winding up of Equitas; or

NOTE: this in turn could precipitate a member's resolution to wind up Equitas Re (see RRC 4, Sch. 3, §2.3(a)) or an application to the court for a winding-up order (*ibid.*, §2.3(b)).

- (c) to exercise any rights it may have to take advantage of any other insolvency, moratorium, reorganisation or reconstruction procedure (or any variation of any existing procedure) which may be available to authorised insurance companies at the time,

or, in connection with any of the above, to apply to the court for the appointment of a provisional liquidator of Equitas or to take any equivalent protective measures in any other jurisdiction or jurisdictions, ERL shall also be entitled to take any such course of action.

NOTE: this in turn could precipitate an application to the court for an order winding up Equitas Re: see RRC 4, Sch. 3, §2.3(b).

any other insolvency, moratorium, reorganisation or reconstruction procedure: the EATF is deemed "inadequate" if an administrator, administrative receiver or manager, receiver, trustee or similar officer is appointed or an administration order made with respect to Equitas Re or all or any substantial part of its assets: EATD, §12(a)(3).

- 8.2 Nothing in schedule 3 shall be construed as limiting the right of the Board of ERL to take such action (including implementing any of the procedures specified in paragraph 8.1) as the Board of ERL may consider appropriate in any circumstances.

NOTE: see RRC 5, Sch. 3, §8.2. Presumably Equitas Re's board is therefore free (but see the annotation to RRC 4, Sch. 3, §8 heading) not to implement a Proportionate Cover Rate at all, or otherwise comply with any RRC 4, Sch. 3 provision.

Suspension of payments

NOTE: see RRC 5, Sch. 3, §9.

9. Following the occurrence of a Certified Reinsurance Trigger Event, ERL shall be entitled, for the minimum period reasonably necessary, to reduce or to suspend payments in respect of the Reinsurance Indemnities under this Agreement, provided that ERL may only exercise such power if it also exercises at or about the same time the equivalent power granted pursuant to all other Reinsurance Indemnities. ERL shall have no power to reduce or suspend payments in respect of any liabilities of ERL other than in respect of Reinsurance Indemnities, and liabilities which are not in respect of Reinsurance Indemnities shall continue to be payable in the ordinary course of business as and when they fall due. Each Name and each Closed Year Name (for himself and for his successors in title) agrees that if ERL exercises the power conferred on it by this paragraph 9, such Name or

Closed Year Name shall not (by himself or in conjunction with others) but without prejudice to clause 3.6 of this Agreement:

NOTE: see RRC 5, Sch. 3, §9. Suspension of payments under RRC 4, Sch. 3, §9 may have the effect of protecting Equitas Re from what would otherwise be a RRC 7, §2.15(c) “Insolvency Event”.

the minimum period reasonably necessary: prolonged suspension of payment deprives Equitas Re of RRC 7, §2.15(c) protection from a Certified Reinsurance Trigger Event.

provided [etc.]: see RRC 4, §3.5 proviso; *ibid.*, Sch. 3, §5.3.

reduce: presumably reduce the amount remitted, not the amount owed in the first place. Equitas Re’s right to reduce, and the process for reducing, the amount owed in the first place are covered by RRC 4, Sch. 3, §3.1 etc.

any liabilities of ERL other than in respect of Reinsurance Indemnities: for example, payments to General Creditors, who are the beneficiaries of express subordination: see for example RRC 4, Sch. 3, §12; RRC 5, Sch. 3, §12.

- (a) take any step or proceeding against ERL or its property (whether by way of demand, set-off, legal proceedings, execution of judgment, enforcement of security, arbitration proceedings or otherwise howsoever) in any jurisdiction whatsoever for the purpose of enforcing his rights under this Agreement or otherwise procuring the payment of any amount in respect of a Reinsurance Indemnity or any part thereof; or

enforcing his rights under this Agreement: the EquitasRe-reinsured SYA participant has no right to have Equitas Re perform its RRC 4, §3 obligations directly to him: see for example RRC 4, §9.4(c) and *ibid.*, s.4.1 *et seq.*

procuring the payment of any amount in respect of a Reinsurance Indemnity: see for example RRC 7, §2.2 etc., on Equitas Policyholders Trustee’s role in paying EquitasRe-assureds-at-Lloyd’s.

- (b) apply to the court under section 53 of the Insurance Companies Act 1982 for leave to petition for the winding up of ERL in accordance with the Insolvency Act 1986 or take or seek to take any action in accordance with any other statutory or common law powers available to such Name including, without limitation, section 122 of the Insolvency Act 1986.

section 122 of the Insolvency Act 1986: Insolvency Act 1986, s.122 (“Circumstances in which company may be wound up by the court”) provides (so far as relevant): “(1) A company may be wound up by the court if — (a) the company has by special resolution resolved that the company be wound up by the court, (b) being a public company which was registered as such on its original incorporation, the company has not been issued with a certificate under section 117 of the Companies Act (public company share capital requirements) and more than a year has expired since it was so registered, (c) it is an old public company, within the meaning of the Consequential Provisions Act, (d) the company does, not commence its business within a year from its incorporation or suspends its business for a whole year, (e) except in the case of a private company limited by shares or by guarantee, the number of members is reduced below 2, (f) the company is unable to pay its debts, (g) the court is of opinion that it is just and equitable that the company should be wound up.”

Entitlement upon liquidation

NOTE: see RRC 5, Sch. 3, §10.

- 10.1 Upon the occurrence of an Automatic Reinsurance Trigger Event the amount of the liability of ERL to Names and Closed Year Names in respect of the Reinsurance Indemnities shall be calculated in accordance with the provisions of paragraph 6 of this schedule, and may be recalculated to the extent considered appropriate by any liquidator of ERL. The amount for which any Name or Closed Year Name or the Trustee on his behalf may prove in the liquidation of ERL shall, accordingly, be limited by reference to the calculation and/or recalculation of the liabilities of ERL following the application of this schedule.

NOTE: to be read with RRC 4 Sch. 3, §§2.3 and 3.1, and (so far as concerns Equitas Policyholders Trustee) RRC 7, §2.10. This clause permits and requires the superimposition of a proportionate cover plan on a liquidation: the liquidation initially proceeds on the basis of Equitas Re’s liabilities as RRC 4, Sch. 3, §3.1-adjusted: see similarly RRC 4, Sch. 3, §11 (Companies Act 1985, s.425 scheme of arrangement)

Automatic Reinsurance Trigger Event: and see RRC 4, Sch. 3, §5.1.

Closed Year Names: error: Equitas Re has no liability to any Closed Year Name : see the annotation to RRC 4, §3.3.

any liquidator: presumably includes a provisional liquidator.

- 10.2 Nothing in this paragraph 10 shall require a liquidator to act in a manner inconsistent with any applicable rule of law.

any applicable rule of law: one issue is whether proportionate cover acts as an overlay or can be disregarded.

Entitlement upon section 425 plan being proposed

11. If ERL proposes a compromise or arrangement within the terms of section 425 of the Companies Act 1985, or any successor thereto, at any time after a Certified Reinsurance Trigger Event has oc-

curred, the amount of the liability of ERL to the Names and Closed Year Names in respect of the Relevant Reinsurance Indemnities (and accordingly the amount for which claims can be made in respect of such liability) shall be calculated in accordance with the provisions of this schedule unless and until the extent of such liability is varied by the terms of any such compromise or arrangement that may be approved.

NOTE: see RRC 5, Sch. 3, §11. And see RRC 4, Sch. 3, §§2.1, 3.1, 8.1(a). This clause requires the superimposition of a proportionate cover plan on a Companies Act 1985, s.425 scheme of arrangement: the proposal stage proceeds on the basis of Equitas Re's liabilities as RRC 4, Sch. 3, §3.1-adjusted: see similarly RRC 4, Sch. 3, §3.3 (liquidation). The EATF is deemed "inadequate" if an "administrator" — which presumably is capable of including a s.425 scheme administrator — is appointed with respect to Equitas Re or all or any substantial part of its assets: EATD, §12(a)(3).

section 425 of the Companies Act 1985: Companies Act 1985, s.425 ("Power of company to compromise with creditors and members") provides:-

'(1) Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between the company and its members, or any class of them, the court may on the application of the company or any creditor or member of it or, in the case of a company being wound up, [or an administration order being in force in relation to a company, of the liquidator or administrator], order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs. (2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the court, is binding on all creditors or the class of creditors or on the members or class of members (as the case may be), and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company. (3) The court's order under subsection (2) has no effect until an office copy of it has been delivered to the registrar of companies for registration; and a copy of every such order shall be annexed to every copy of the company's memorandum issued after the order has been made or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting the company or defining its constitution. (4) If a company makes default in complying with subsection (3), the company and every officer of it who is in default is liable to a fine. (5) An order under subsection (1) pronounced in Scotland by the judge acting as vacation judge in pursuance of section 4 of the Administration of Justice (Scotland) Act 1933 is not subject to review, reduction, suspension or stay of execution. (6) In this section and the next (a) "company" means any company liable to be wound up under this Act, and (b) "arrangement" includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.' And see for example *ibid.*, ss. 426-427.

Names: cf. RRC 4, Sch. 3, §3.1 ("Reinsured Parties").

Closed Year Names: error: Equitas Re has no liability to any Closed Year Name : see the annotation to RRC 4, §3.3.

Subordination to General Creditors

12. Each Reinsured Name acknowledges and agrees that its right to receive any payment from ERL shall be subordinated to (i) payment of the General Creditors in full; and (ii) payment of (or the making of appropriate provisions for payment of) the expenses of a liquidation, a section 425 plan or other insolvency, moratorium reorganisation or reconstruction procedure (or any variation of any existing procedure), as the case may be, in full.

NOTE: and see RRC 7, Sch. 3, §13. See the analog at RRC 5, Sch. 3, §12, and Equitas Ltd.'s *ibid.*, Sch. 3, §16 comprehensive full indemnity to Equitas Re in relation to General Creditors. On General Creditors, see also for example RRC 4, Sch. 3, §§2.1(a), 2.1(b), 5.1(c); RRC 5, Sch. 3, §§2.1(a), 2.1(b), 4, 5.1(c), 12, 16. Like the rest of RRC 4, this provision does not affect the EquitasRe-assured's-at-Lloyd's right to full indemnification at Lloyd's. A solvent Equitas Re need take no particular account of General Creditors ordinarily.

Reinsured Name: the EquitasRe-reinsured SYA participant is expressly excluded from being a payee of Equitas Re in any event: see RRC 4, §9.4(c).

its right: error for "his right": the EquitasRe-reinsured SYA participant will almost invariably be a natural Member (corporate Members sold insurance for the first time from the 1994 UY). Cf. equivalent words at RRC 5, Sch. 3, §12.

to receive: the EquitasRe-reinsured SYA participant's relevant interests are already subject to the RRC 4, §4 assignment to Equitas Policyholders Trustee.

any payment: notwithstanding that relevant debts to "General Creditors" are not RRC 4 "Secured Obligations". Query the extent to which RRC 4, Sch. 3, §12 applies if Equitas Re does not use a Proportionate Cover Plan.

section 425 plan: viz., a scheme of arrangement under Companies Act 1985, s.425 (which does not use the term "plan").

Upwards adjustment of payments

NOTE: cf. RRC 5, Sch. 3, §13. RRC 4, Sch. 3, §13, which should be read with RRC 4, §9.4(c),¹⁵⁹ provides for any previously expected available monies at Equitas Ltd. during a RRC 5, Sch. 3 Retrocession Plan to be held on trust by Equitas Re to pay to Actual Insurance Creditors, and thereafter Contingent Insurance Creditors.

¹⁵⁹ And see *SOD*, App. 5, §1.8 (p.2):-

- 13.1 If, at any time when a Retrocession Plan is in force, there is an upwards adjustment in a Retrocession Rate, ERL shall, for each payment that has been made on the basis of a Retrocession Rate lower than the new adjusted Retrocession Rate, be entitled to compensation from Equitas. The compensation shall be such amount as is required to increase the level of payments already made to the same level as it is proposed to pay in respect of payments subject to the new adjusted Retrocession Rate.
- 13.2 ERL and Equitas acknowledge that compensation payments made will be identifiable by reference to specific Names and/or Closed Year Names, on an individual basis, in respect of whom payments to Insurance Creditors have been made at a rate lower than 100% following the implementation of a Proportionate Cover Plan. In the event that ERL receives a compensation payment from Equitas, pursuant to paragraph 13.1 of this schedule, it shall hold such payment on trust for the following purposes:
- compensation:** apparent error for “compensating”.
- NOTE:** *cf.* Equitas Policyholders Trustee’s role at RRC 7, §2.4 *et seq.* It is not clear how RRC 4, Sch. §13.2 works in relation to relevant parts of RRC 7.
- (a) to the extent that the Actual Insurance Creditors of a Name in respect of which a compensation payment is received have not been paid in full, such payment will be applied to increase or, where possible, discharge in full any remaining amounts due in respect of such Actual Insurance Creditors. Where it is not possible to make payment in full to such Actual Insurance Creditors, payment will be made pro rata;
- of which:** error for “of whom”: only natural Members were “Names”.
- (b) where the Actual Insurance Creditors of a Name have been paid in full but the Name in question has Contingent Insurance Creditors then any compensation payment applicable to such Name shall be retained on trust for the payment of any amounts due in respect of such Contingent Insurance Creditors;
- on trust:** presumably in accordance with RRC 7 (there apparently is no other relevant trust deed).
- (c) where a compensation payment has been received for the benefit of a Name in respect of whom all Actual Insurance Creditors and Contingent Insurance Creditors (in circumstances where the full discharge of Contingent Insurance Creditors can, to the reasonable satisfaction of ERL, be conclusively proved) have been discharged in full then, subject to sub-paragraph (d) below, any such payment, or the remaining balance of any such payment, will be paid to the Name; and
- NOTE:** *cf.* RRC 7, §2.7(d) (distribution by Equitas Policyholders Trustee to the EquitasRe-reinsured SYA participant in the event of the former appropriating Equitas Re’s assets after an RRC 7 Insolvency Event).
- (d) where the Actual Insurance Creditors and Contingent Insurance Creditors of a Name have been discharged in full but all or part of such payment has been made directly or indirectly by a third party source other than ERL (including, without limitation, Lloyd’s, members of Lloyd’s or any subsidiary of Lloyd’s or from a regulatory deposit which Lloyd’s, members of Lloyd’s or any subsidiary of Lloyd’s is obliged to or chooses to replenish) then, to the extent of the amount of any payment made by that third party, ERL shall make an equivalent payment to such third party source.
- 13.3 The reference in paragraph 13.2(d) to the making of a payment by a third party source includes payments incurred in replenishing regulatory deposits out of which payments have been made in discharging the liability in question or, in the case of a regulatory deposit which consists of or includes a guarantee, letter of credit or other arrangement, in reimbursing sums paid under that guarantee, letter of credit or other arrangement in or towards the discharge of that liability.

If any pay-out rate were to be increased following the introduction of a proportionate cover plan, adjustment amounts would be due based on the difference between the amount paid on claims at the lower rate by Equitas Limited and the amount which would have been paid had they been paid at the new rate. Such amounts will only be paid directly to a Name where Equitas has resumed payment of claims in full and the Name has satisfied the balance of the reduced claims paid on his behalf. Otherwise, such amounts will be retained by Equitas and applied on behalf of the Name concerned to make up any shortfall to policyholders of that Name who have been or are to be paid at a reduced rate. The need to provide for such adjustment amounts will be taken into account in the process of setting the new pay-out rate. Any payment directly to a Name will be paid into the Name’s premiums trust funds for so long as the relevant premiums trust deed remains in force. Where a Name has ceased underwriting and has no further insurance creditors, he will be entitled to receive a make-up payment even if the pay-out rate has not been increased to 100 per cent.

Professional advice

14. In making any determination under this schedule, the Board or ERL shall be entitled to rely on such professional advice as it considers appropriate and the determination of the Board of ERL in respect of any matter in relation to clause 3.5, this schedule or a Proportionate Cover Plan shall be conclusive and binding on all the Names and the Closed Year Names. Without prejudice to clause 3.6 of the Agreement, no person shall have any claim against ERL or Equitas (or any officer, director or employee of ERL or Equitas) arising directly or indirectly out of any decision taken or omitted to be taken in relation to the application of this schedule.

NOTE: see RRC 5, Sch. 3, §14.

Board or ERL: error for “Board of Equitas”: see RRC 5, Sch. 3, §14.

Notices

15. Any notice to be given under this schedule shall be given in accordance with the provisions of clause 22 of this Agreement.

NOTE: see RRC 5, Sch. 3, §15.

SCHEDULE 6

Relevant Motor and Employer’s Liability Syndicates

Managing Agent / Run-off Company *Syndicate Number (for all relevant years of account)*

Active	350; 892; 962
Archer	866
Bankside	1156; 980; 45
Bates Cunningham	877; 1144
Brockbank	253
Christopherson Heath / CHCML	218
Crowe	963
Duncanson & Holt	55
Eversure / Octavian	554
Janson Green	386
KGM	260
Marchant & Kett	234
Murray Lawrence	820; 887; 913
Octavian	508
R. J. Kiln	603
Service	979
Stewart	587; 15; 396
Sturge Motor	37; 293; 330; 897
SUM	254; 992; 1152
SUM / CHCML	560
Wellington	1184; 439
Wren	93; 388

EXECUTED as a DEED by:
EQUITAS REINSURANCE LIMITED acting by two Directors / a Director and Secretary

By:
(Director) M. CRALL

By:
(Director) J. TEFF

EXECUTED as a DEED by
ADDITIONAL UNDERWRITING AGENCIES (No. 9)
LIMITED acting by two Directors / a Director and Secretary

By:
Duly authorised representative of Lloyd's (Director) A. DUGUID

By:
Duly authorised representative of Additional Underwriting
Agencies (No. 10) Limited (Director) DEBORAH WILKS

THE COMMON SEAL OF LLOYD'S was hereunto affixed
in the presence of:

Authorised Signatory H. WALSH

SIGNED BY:
duly authorised representative of A. DUGUID
THE SOCIETY OF LLOYD'S for and on behalf of
ADDITIONAL UNDERWRITING AGENCIES (No. 9)
LIMITED acting as Substitute Agent for and on behalf of
the NAMES

SIGNED BY:
duly authorised representative of A. DUGUID
THE SOCIETY OF LLOYD'S for and on behalf of
ADDITIONAL UNDERWRITING AGENCIES (No. 9)
LIMITED acting as Substitute Agent for and on behalf of
the
CLOSED YEAR NAMES

EXECUTED as a DEED by
EQUITAS LIMITED
acting by two Directors / a Director and Secretary
Director
Director / Secretary

M. CRALL

Director
Director/Secretary

J. TEFF

SIGNED BY:
duly authorised representative of
THE SOCIETY OF LLOYD'S for and on behalf of
ADDITIONAL UNDERWRITING AGENCIES (No. 10)
LIMITED

DEBORAH WILKS

SIGNED BY:
for and on behalf of
EQUITAS POLICYHOLDERS TRUSTEE LIMITED

M. CRALL

Appendix 1.3

Retrocession Agreement (RRC 5)

INTRODUCTORY NOTE

A1.3-1 A moment after entering into RRC 4, Equitas Re, contractually empowered¹ by every EquitasRe-insured SYA participant, entered with Equitas Ltd., its wholly owned subsidiary,² and on a profit-sharing basis,³ into RRC 5, in which Equitas Re: (1) retroceded⁴ all⁵ its RRC 4, §3 reinsurance liabilities to Equitas Ltd., Equitas Ltd.’s board⁶ having decided that Equitas Ltd. would unconditionally undertake, in return for “Retrocession Consideration”⁷ (essentially Equitas Re’s entire assets), the RRC 5, §2 “Retrocession Obligation”;⁸ (2) appointed Equitas Ltd. as its RRC 4, §9 run-off sub-agent in relation to all the retroceded liabilities.⁹ As a result of RRC 5, Equitas Ltd. is the Equitas Group’s “principal operating company”.¹⁰

¹ See RRC 4, §9.3.

² See p.39.

³ See for example RRC 5, §4 and *ibid.*, Sch. 2 (“Profit Participation”).

⁴ See for example RRC 5, recitals (B) and (C); *ibid.*, §2.1 etc.

⁵ See RRC 5, recital (A) (“Initial Retrocession Contracts”) and *ibid.*, Sch. 1, §1 (“Additional Retrocession Contracts”).

⁶ See p.40.

⁷ See generally RRC 5, §3.

⁸ See for example RRC 1, §2.1(e).

⁹ See generally RRC 5, §5.

¹⁰ See p.39.

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FORM OF RETROCESSION AGREEMENT [RRC 5]

*[This is RRC 4, App. 2. Unless otherwise stated this is version FW962500.261/2+.
Where RRC 5 is closely similar to RRC 4, see the latter for more extensive annotations.]*

THIS RETROCESSION AGREEMENT is made on [3] September 1996

| **[3]:** the version used has no number. See the equivalent place at RRC 4.

BETWEEN:

| **NOTE:** RRC 5 is between only Equitas Re and Equitas Ltd. RRC 5, §2.6 expressly excludes third party beneficiaries.

EQUITAS REINSURANCE LIMITED a limited company registered in England and Wales with company number 3136300 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (*ERL*); and

| **NOTE:** For RRC 5 use of “ERL”, see *ibid.*, *passim*.

| **20-22 Bedford Row, London WC1R 4JS:** obsolete: Equitas Re’s registered office is presently 33 St. Mary Axe, London EC3A 8LL.¹²

EQUITAS LIMITED a limited company registered in England and Wales with company number 3173352 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (*Equitas*).

| **NOTE:** For RRC 5 use of “Equitas”, see *ibid.*, *passim*.

| **20-22 Bedford Row, London WC1R 4JS:** obsolete: Equitas Ltd.’s registered office is presently 33 St. Mary Axe, London EC3A 8LL.¹³

WHEREAS:

- (A) ERL has entered into reinsurance contracts under which it has agreed to reinsure and indemnify the Names and the Closed Year Names in respect of 1992 and Prior Business (the *Equitas Reinsurance Contract*), Centrewrite in respect of its liabilities to the Warrilow Syndicates in respect of 1992 and Prior Business (the *Centrewrite Reinsurance*), the E&O Companies in respect of all liabilities in respect of 1992 and Prior Business under the E&O Policies (the *E&O Companies Reinsurance*) and the PSL Companies in respect of certain personal stop loss liabilities (the *PSL Companies Reinsurance*) (the *Initial Reinsurance Contracts*) and to administer the run-off of such business.

| **Equitas Reinsurance Contract:** *viz.*, RRC 4.

- (B) Equitas is willing to accept the retrocession of the liabilities of ERL under the Reinsurance Contracts and the delegation of the run-off of such business.
- (C) Equitas is in principle willing to accept the retrocession of liabilities of ERL under any other contract of reinsurance underwritten by ERL and any such future retrocession will be entered into pursuant to this Agreement.

| **NOTE:** Equitas Ltd. will obtain its business from Equitas Re, not independently.

IT IS HEREBY AGREED AS FOLLOWS:

RETROCESSION CONDITIONS

Conditions

1. The obligations of Equitas to reinsure ERL in accordance with clause 2 shall be conditional upon:

¹² Equitas Re 363s December 11, 2001 annual return as at December 5, 2001, p.1.

¹³ Equitas Ltd. 363s December 11, 2001 annual return as at December 5, 2001, p.1.

- (a) the Board of Equitas resolving that ERL unconditionally accepts the Retrocession Obligation subject only to receipt of consent from the Secretary of State pursuant to the relevant provisions of the Notice of Requirements; and

the Board of Equitas: “board” has a particularly wide meaning in Equitas Ltd.’s Articles of Association.¹⁴ It is also separately defined at RRC 5, §17.

Secretary of State: see RRC 4, Sch. 2, §1 definition of “Secretary of State”.

- (b) Equitas having received consent from the Secretary of State pursuant to the relevant provisions of the Notice of Requirements to accept unconditionally the Retrocession Obligation,

and shall take effect upon the Equitas Reinsurance Contract becoming unconditional in all respects.

THE RETROCESSION OBLIGATION

Scope of retrocession obligation

- 2.1 Subject to the conditions in clause 1 having been satisfied, in consideration of the Retrocession Consideration, Equitas shall reinsure and indemnify ERL in respect of the aggregate ultimate liability of ERL under the Initial Reinsurance Contracts upon and subject to the terms of this Agreement.

NOTE: this should be read with RRC 4, §3.1 (Equitas Re’s reinsurance obligation); but Equitas Re has no express RRC 4 power to buy reinsurance from Equitas Ltd.: RRC 4 merely envisages (at *ibid.*, recital (G)) that it will do so. On the extent of Equitas Ltd.’s retrocession obligation, see RRC 5, §2.3.

- 2.2 In consideration of the relevant Additional Retrocession Consideration, Equitas shall further reinsure and indemnify ERL in respect of the aggregate ultimate liability of ERL under the relevant Additional Reinsurance Contract upon and subject to the terms of this Agreement.

NOTE: cf. RRC 4, §3.1. any other reinsurance contract written by Equitas Re — Additional Reinsurance Contracts (as defined¹⁵) — in return for Additional Retrocession Consideration¹⁶ (as defined¹⁷).

- 2.3 The reinsurance and indemnity obligations of Equitas pursuant to clause 2.1 and clause 2.2 shall be to indemnify ERL from the Effective Date and any relevant Additional Effective Date respectively, by way of reinsurance, for all liabilities, losses, claims, returns, reinsurance premiums, costs and other liabilities, outgoings and expenses, including extra-contractual obligations or punitive or penal damages arising, other than Assumed Liabilities, without limitation in time and amount, in respect of the reinsurance obligations contained in the Reinsurance Contracts, after deduction of:

NOTE: see the corresponding provision at RRC 4, §3.2 and see *ibid.*, §10.2. RRC 5, §2.4 empowers Equitas Ltd. to adjust Equitas Ltd.’s liability to Equitas Re on the occurrence at any time of either a Certified Trigger Event or an Automatic Trigger Event.¹⁸

- (a) all amounts recoverable and actually recovered after the Effective Date in respect of any relevant contract of outward reinsurance (including any Syndicate Reinsurances); and

NOTE: cf. RRC 4, §3.2(a).

- (b) all other income receivable and actually received after the Effective Date, including salvages or other moneys, which may be applied in reducing the amount of any liability compromised in the Reinsured business.

NOTE: cf. RRC 4, §3.2(b).

In the performance of the Retrocession Obligation in respect of liabilities under the Reinsurance Contracts Equitas shall have the obligation and responsibility for the collection of the amounts referred to in (a) and (b) above and any risk for failure to collect such amounts and shall, subject to and in accordance with the remainder of this clause 2, discharge the Retrocession Obligation in re-

¹⁴ See Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member’s written resolution), §3(b):-

the word *board* in the context of the exercise of any power contained in these Articles includes any committee consisting of one or more directors, any director holding executive office and any local or divisional board, manager or agent of the Company to which or, as the case may be, to whom the power in question has been delegated[.]

¹⁵ See the definition at RRC 5, Sch. 1, §1.

¹⁶ See RRC 5, recital (C) and *ibid.*, §2.2.

¹⁷ See the definition at RRC 5, Sch. 1, §1.

¹⁸ RRC 5, §2.4 and *ibid.*, Sch. 3, §2.1 *et seq.*

spect of liabilities under any Reinsurance Contract by payment of amounts agreed or lawfully due under that Reinsurance Contract. This reinsurance shall have effect as if incepting as at the Inception Date and the Retrocession Consideration is calculated accordingly.

NOTE: *cf.* RRC 4, §3.2.

shall ... discharge the Retrocession Obligation ... by payment: presumably by performing RRC 4, §3.4 in place of Equitas Re.

- 2.4 If at any time a Certified Retrocession Trigger Event or Automatic Retrocession Trigger Event, as the case may be, occurs, the liability of Equitas to ERL in respect of the Retrocession Obligation (whether or not previously adjusted as a result of any prior operation of this clause 2.4) shall be adjusted subject to and in accordance with the provisions of schedule 3.

NOTE: *cf.* RRC 4, §3.5.

Certified Retrocession Trigger Event or Automatic Retrocession Trigger Event: these terms, not used elsewhere in RRC 5, are presumably error for “Certified Trigger Event” and “Automatic Trigger Event”.

adjusted: see RRC 5, Sch. 3, §3.1 *et seq.*

- 2.5 Equitas, in respect of any decision to adjust the liability of Equitas to ERL pursuant to this Agreement acknowledges and agrees that such decision shall be taken bona fide and that all reasonable skill, care and diligence will be taken in arriving at any such decision.

NOTE: *cf.* RRC 4, §3.6; RRC 5, §6.1.

adjusted: see RRC 5, Sch. 3, §3.1 *et seq.*

- 2.6 It is hereby acknowledged by each of the parties to this Agreement that this Agreement is not intended to and does not create any obligations to, or confer any rights upon, Insurance Creditors or any other persons not parties to the Agreement. It is hereby further acknowledged by each of the parties to this Agreement that this Agreement is not intended to and does not create any third party beneficiary status in or confer third party beneficiary rights upon, Insurance Creditors or any other person with respect to the Retrocession Obligation.

NOTE: *cf.* RRC 4, §3.7.

ELEMENTS AND DISCHARGE OF CONSIDERATION

Retrocession Consideration

- 3.1 The Retrocession Consideration shall be:

- (a) all consideration realised by ERL pursuant to clauses 5.1(a) and 5.1(d) of the Equitas Reinsurance Contract;

NOTE: see RRC 4, §5.1 etc.¹⁹ The consideration included²⁰ the entirety of the consideration received by Equitas Re for providing EquitasRe-reinsurance less £710m. And see RRC 5, recital (B); RRC 16, second recital. Special considerations apply to consideration emanating from relevant LATFs: see the summary at EATD, recitals [11] and [12].

- (b) all Syndicate Premiums paid to ERL pursuant to clause 5.1(b) of the Equitas Reinsurance Contract; and

- (c) otherwise all premiums payable under the Initial Reinsurance Contracts, less an amount of cash in aggregate equal to £710,000,000.

- 3.2 From the Effective Date, ERL shall as further consideration for the Retrocession Obligation assign to Equitas all such rights as ERL has or shall have, including without prejudice to the generality of the foregoing the benefit of any undertaking to assign the same and the right to collect the same, in or to moneys and other assets receivable or becoming payable under the Syndicate Reinsurances or of premiums, premium returns, salvages or other assets receivable from any other person (and, in each case, any security therefor) after the Effective Date.

NOTE: Equitas Re itself came by such outward reinsurance by way of assignment: see principally RRC 4, §§6.1, 6.4 and 6.5 (*cf.* the RRC 4, §4 assignments by the EquitasRe-reinsured SYA participant to Equitas Policyholder Trustee, which are not covered by RRC 5, §3.2).

¹⁹ And see RRC 16, second recital.

²⁰ See RRC 5, §§3.1 to 3.6.

- 3.3 Any amount received by Equitas pursuant to clause 3.2 which is by the terms of the relevant Syndicate Reinsurance (other than any Financial Reinsurance) payable to or subject to a legally enforceable duty to account to Insurance Creditors or reinsurers of the relevant 1992 and Prior Business shall upon receipt be applied by Equitas in making such payment or rendering such account but subject thereto for Equitas absolutely.
- 3.4 In consideration of the amount paid under clause 3.1(b) and of the receipt by Equitas of that part of the consideration within clause 3.1(a) which consists of cash at bank, Equitas undertakes to be responsible for the payment, satisfaction, discharge, performance and fulfilment of the Assumed Liabilities of all Syndicates outstanding as at the Effective Date, as shown in the Completion Accounts to be prepared in accordance with the Completion Accounts and Co-operation Agreement except to the extent that consideration so realised by ERL is applied in discharge of ERL's obligations to Equitas under the Subscription Agreement.

Assumed Liabilities: special arrangements apply in relation to EATD "American Business": see the summary at EATD, recitals [11] and [12].

- 3.5 In respect of any Additional Reinsurance Contract, the provisions of clauses 3.1 and 3.2 shall apply as if references to the Retrocession Consideration were references to the relevant Additional Retrocession Consideration and references to the Effective Date were references to the relevant Additional Effective Date.

Discharge

- 3.6 In consideration of the Retrocession Obligation ERL will discharge the Retrocession Consideration through the payment or other transfer to Equitas of the consideration realised by ERL pursuant to the Equitas Reinsurance Contract and all consideration otherwise received under the Initial Reinsurance Contracts as soon as reasonably practicable after so realised or received by ERL except to the extent that consideration so realised by ERL is applied in discharge of ERL's obligations to Equitas under the Subscription Agreement.

No termination for non-disclosure

- 3.7 Equitas acknowledges that, the Reserve Groups, Lloyd's and ERL have been provided with or been given access to certain materials and information and received representations and responses to certain questions put to the Managing Agent of each Syndicate or any predecessor managing agency of that Syndicate in relation to the Syndicate 1992 and Prior Business of that Syndicate, assets held in respect thereof and non-insurance liabilities of that Syndicate (such materials, information, representations and responses being collectively referred to as the Disclosure). Equitas shall have no right to avoid this Agreement after the Effective Date by reason of any non-disclosure or misrepresentation (whether or not innocent) notwithstanding that some material facts or matters may not have been or may not be disclosed to ERL, any Reserve Group or Lloyd's and/or that some of the Disclosure may not be accurate or complete.

NOTE: cf. RRC 4, §3.9. See also (for example) RRC 4, §2.1(b)(iv) (determination that there are no circumstances likely to have a material adverse effect on Equitas Re's "business and prospects"). At RRC 1, §4.7, each "Accepting Name" settled his claims against "Additional Persons" (ditto) in relation to setting of the Equitas Re-reinsurance premium and other relevant matters.

acknowledges that,; the comma appears to be superfluous.

PROFIT PARTICIPATION

4. The Retrocession Consideration shall be the entire consideration due in consideration of the Retrocession Obligation. ERL will be entitled to a profit participation in relation to that part of Equitas' liabilities which consists of the performance of the Retrocession Obligation, the terms of which participation are contained in schedule 2.

DELEGATION OF RUN-OFF TO EQUITAS

5. ERL hereby delegates to Equitas, and Equitas assumes the full management of, the Run-off and all the rights, powers, duties and obligations of ERL in relation to the Run-off assumed by ERL under the Initial Reinsurance Contracts and ERL undertakes to delegate to Equitas, and Equitas undertakes to assume the full management of, the run-off of any business and all the rights, powers, duties and obligations of ERL in relation to the run-off of that business assumed by ERL under any Additional Reinsurance Contracts (including, without prejudice to the generality of the foregoing, the power of

delegation contained in each of those agreements) and Equitas shall be entitled to exercise all rights ERL has or may have under any Reinsurance Contract and shall comply with all duties and obligations ERL has or may have under any Reinsurance Contract, as if the terms of that Reinsurance Contract were set out herein and references to ERL were references to Equitas.

NOTE: this should be read with RRC 4, §9.3 (Equitas Re's power to delegate its RRC 4, §9 run-off agency functions). Separately and additionally to Equitas Re and Equitas Ltd. acting as insurers, Equitas Re, per its RRC 4, §9.3 power to delegate, here delegates its run-off management functions to Equitas Ltd. Equitas Ltd. becomes Equitas Re's contractual run-off sub-agent, and each EquitasRe-reinsured SYA participant's common law agent. Equitas Re remains "responsible" for any sub-agent's defaults: RRC 4, §9.3. The Names and the Closed Year Names acknowledge that it is intended that all Equitas Re's RRC 4 rights, powers, duties and obligations will be delegated to Equitas Ltd. in RRC 5: RRC 4, §9.3. They similarly acknowledge that Equitas Ltd. may sub-delegate to third parties and their subcontractors: *ibid.*

Equitas Ltd.'s functions etc. as a delegate, and Equitas Ltd.'s own sub-delegates' functions etc., are set out at RRC 4, §§9.4 (delegate and sub-delegate to have power to manage each Run-off in accordance with RRC 4 etc.); 9.4(a) (delegate and sub-delegate not bound to comply with EquitasRe-reinsured SYA participant's instructions or requests); 10.2 (Equitas Re indemnifies each EquitasRe-reinsured SYA participant against liability arising from a delegate's or sub-delegate's relevant acts and omissions); 14.1 (AUA 9 further assurance); 14.2 (AUA 9 undertaking re exercise of power of attorney).

including ... the power of delegation contained in each of those agreements: RRC 4, §9.3 expressly empowers Equitas Re to delegate, to Equitas Ltd., Equitas Re's power to delegate, but does not expressly directly empower Equitas Ltd. to sub-delegate; each EquitasRe-reinsured SYA participant does expressly acknowledge in *ibid.* that it is possible (RRC 4, §9.3 last "may" in that sense) that Equitas Ltd. will sub-delegate. Each of Equitas Ltd.'s agents is each EquitasRe-reinsured SYA participant's common law sub-sub-agent. Equitas Ltd. does not in RRC 5 expressly sub-delegate to any third party.

as if the terms of that Reinsurance Contract were set out herein and references to ERL were references to Equitas: but Equitas Ltd. is not novated to any part of RRC 4 in Equitas Re's place; Equitas Ltd. is merely Equitas Re's run-off agent and the Name's run-off contractual sub-agent.

DUTIES AND LIABILITY OF EQUITAS

Standard of care

- 6.1 In performing its duties and exercising its powers under this Agreement, Equitas shall operate its business and conduct its affairs in a bona fide and businesslike manner and use all reasonable skill, care and diligence for the proper provision of services, performance of duties and exercise of powers by it under this Agreement.

NOTE: *cf.* RRC 4, §10.1; RRC 5, §2.5.

Liability of Equitas

- 6.2 Equitas shall be responsible and liable for its own acts and omissions (including without limitation any errors, omissions, breaches of contract and breaches of fiduciary duty) and for those of its employees, agents, sub-contractors and representatives in the conduct of the Run-off.

NOTE: *cf.* RRC 4, §10.2.

Indemnity

- 6.3 Equitas shall indemnify and hold ERL harmless against all losses, costs, expenses, claims, demands and liabilities whatsoever which may be incurred by ERL as a result of or arising in connection with the negligence or deliberate default on the part of Equitas or its employees, agents, or sub-contractors and representatives in the performance of the duties and functions of Equitas under this Agreement.

NOTE: *cf.* RRC 4, §10.2.

BOOKS AND RECORDS

NOTE: *cf.* RRC 4, §15.

Access to Books and Records

- 7.1 ERL shall, on or after the Effective Date or relevant Additional Effective Date transfer or procure the transfer of such Books and Records of each Syndicate and each other Reinsured Party as are in its custody, possession or control which relate exclusively to the liabilities reinsured under the Reinsurance Contracts to Equitas, as required by Equitas, which Equitas shall then hold as sub-agent on behalf of the relevant Reinsured Party.

Return of Books and Records on termination

- 7.2 If this Agreement is terminated in accordance with its terms, Equitas shall return to ERL or as ERL may direct such Books and Records as have been transferred to it and such copies of the Books and Records as have been taken by it.

Equitas' maintenance of Books and Records

- 7.3 Equitas shall, until the Business of each Reinsured Party has been discharged in full:
- (a) use all reasonable endeavours to keep safe all Books and Records relating to any Reinsured Party delivered to it by ERL in accordance with such reasonable data and document retention policy as may be issued by Equitas from time to time;
 - (b) maintain records of its conduct of the run-off of the business of each Reinsured Party showing the same separately from its conduct of the business of the other Reinsured Parties but only insofar as it determines that such separate books and records are necessary for the proper carrying on of its business.

CONFIDENTIALITY

8. Equitas hereby undertakes to use all reasonable endeavours to ensure that it and its respective employees, agents and contractors shall keep any Confidential Information strictly private and confidential and to comply with the provisions of clause 17 of the Equitas Reinsurance Contract as if the terms thereof were set out herein and references to ERL were, where the context so permits, references to Equitas.

| **NOTE:** *cf.* RRC 4, §17.

BENEFIT OF ERL'S RIGHTS AGAINST THE SUBSTITUTE AGENT AND THE REINSURED PARTIES

9. ERL agrees at the request of Equitas to enforce for the benefit of Equitas all or any of its rights under the Reinsurance Contracts.

INVALIDITY

10. If any provision of this Agreement other than the obligations of Equitas under clause 2 is held to be invalid or unenforceable, then such provision shall (so far as it is invalid or unenforceable) be given no effect and shall be deemed not to be included in this Agreement but without invalidating any of the remaining provisions of this Agreement.

| **NOTE:** *cf.* RRC 4, §21.

NOTICES

11. Any notice or notification to be given hereunder shall be in writing and may be given either by personal delivery, first class post or facsimile to the address of the other party set out in this Agreement or to such other address as any such party may have notified as being its service address for the purposes of this Agreement.

| **NOTE:** *cf.* RRC 4, §22.

VARIATION

12. No variation, supplement, deletion or replacement of this Agreement (or of any of the documents referred to herein) shall be valid unless it is in writing and signed by or on behalf of each of the parties hereto.

| **NOTE:** *cf.* RRC 4, §23.

GOVERNING LAW, JURISDICTION AND SERVICE OF PROCESS

Governing law and jurisdiction

13. This Agreement and all the terms and provisions hereof and all questions of construction, validity and performance hereunder shall be governed by and construed in accordance with the laws of England. Each party irrevocably and unconditionally agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature which may arise out of or in connection with this Agreement.

| **NOTE:** cf. RRC 4, §25.

AS WITNESS the hands of the duly authorised representatives of the parties hereto the date and year first above written.

SCHEDULE 1 — DEFINITIONS AND INTERPRETATION

[Author’s note: the text of definitions from and including *Additional Retrocession Consideration to Retrocession Plan* are taken from version FW962500.261/2+].

1. Expressions defined in the Equitas Reinsurance Contract shall have the same meaning in this Agreement. In addition, the following expressions shall have the following meanings:-

Additional Effective Date means, in respect of any Additional Reinsurance Contract, the date on which such contract becomes wholly unconditional;

| **NOTE:** for RRC 5 use, see *ibid.*, §§2.3, 3.5, 7.1.

Additional Retrocession Consideration means, in respect of any Additional Reinsurance Contract, the consideration agreed between ERL and Equitas for the retrocession of liabilities under such Additional Reinsurance Contract to Equitas;

| **NOTE:** for RRC 5 use, see *ibid.*, §§2.2, 3.5.

Additional Reinsurance Contracts means any contract of reinsurance underwritten by ERL other than the Initial Reinsurance Contracts;

| **NOTE:** for RRC 5 use, see *ibid.*, §5; Sch. 1, §1 definition of “Reinsurance Contracts”.

E&O Companies shall have the meaning ascribed thereto in the E&O Companies Reinsurance;

| **NOTE:** for RRC 5 use, see *ibid.*, recital (A); Sch. 1, §1 definition of “Reinsured Parties”.

E&O Policy shall have the meaning ascribed thereto in the E&O Companies Reinsurance;

| **NOTE:** the term is not used in RRC 5 as extracted.

External Capital means any debtor relationship of Equitas entered into, or share capital issued by Equitas, for the purpose of financing its insurance business to the extent that that business is the performance of the Retrocession Obligation and in this definition debtor relationship has the meaning it has for the purposes of corporation tax;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 2, §1 definition of “Available Surplus”, “Deficit”.

PSL Companies shall have the meaning ascribed thereto in the PSL Companies Reinsurance;

| **NOTE:** for RRC 5 use, see *ibid.*, recital (A), Sch. 1, §1 definition of “Reinsured Parties”.

Reinsurance Contracts means the Initial Reinsurance Contracts and the Additional Reinsurance Contracts;

| **NOTE:** for RRC 5 use, see *ibid.*, recital (B), §§2.3, 7.1, 9. And see *ibid.*, recital (A) (“reinsurance contracts”).

| **Initial Reinsurance Contracts:** defined at RRC 5, recital (A).

| **Additional Reinsurance Contracts:** defined at RRC 5, Sch. 1, §1.

Reinsured Parties means each of the Syndicates, the Closed Year Syndicates, Centrewrite, each of the E&O Companies, each of the PSL Companies and each reinsured under any Additional Reinsurance Contract;

| **NOTE:** for RRC 5 use, see *ibid.*, §§7.3(b), 9 heading. Cf. RRC 4, Sch. 2, §1’s materially different definition.

Relevant Retrocession Rate has the meaning given in schedule 3;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §13.

Retrocession Consideration means the consideration to be discharged under clause 3.1 by ERL in consideration for the Retrocession Obligation;

NOTE: for RRC 5 use, see *ibid.*, §§2.1, 2.2, 2.3, 3.1, subheading, 3.1, 3.5, 3.6, 4; Sch. 1, §1 defined term “Additional Retrocession Consideration”

Retrocession Obligation means the obligation of Equitas to reinsure ERL in accordance with clause 2;

NOTE: for RRC 5 use, see *ibid.*, §§1(a), (b), 2.1 heading, 2.3, 2.4, 2.6, 3.2, 3.6, 4, Sch. 1, §1 definition of “External Capital”, “Retrocession Consideration”.

Retrocession Plan has the meaning given in schedule 3;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3 heading, Sch. 3, §§1, 2.1(a), (b), 4, 5.1 heading, 5.1, 5.3, 6.3, 13, 14, 17 definition of “Original Liability”, “Retrocession Declaration”. Also defined at RRC 4, Sch. 2, §1.

Substitute Agent means the substitute agent appointed by the Council under the Substitute Agents Byelaw (No. 20 of 1983) as managing agent of each of the Syndicates and the Closed Year Syndicates; and

NOTE: for RRC 5 use, see *ibid.*, §9 heading; Sch. 3, §17 definition of “Illinois Collateral Reinsurance”.

Trigger Event has the meaning given in paragraph 2 of schedule 3.

NOTE: error for “Certified Trigger Event” and “Automatic Trigger Event”: the term “Trigger Event” *simpliciter* is not used in RRC 5, Sch. 3. See *ibid.*, Sch. 3, §§2.1 heading, 3.1, §17 definition of “Adjustment Entitlement”.

...

SCHEDULE 3 — OPERATION OF RETROCESSION PLAN

NOTE: see generally the closely similar RRC 4, Sch. 3 and the annotations therein (relevant annotations to RRC 5, Sch. 3 are therefore minimal).

Retrocession Plans

1. The introduction of a Retrocession Plan and the administration of any such plan, introduced pursuant to the provisions of clause 2.4 of the Agreement, shall be governed by the following provisions of this schedule.

NOTE: see RRC 4, Sch. 3, §1.

Trigger Events

NOTE: see RRC 4, Sch. 3, §2.

- 2.1 The circumstances described in clause 2.4 of the Agreement as Certified Trigger Events are:

- (a) at any time when a Retrocession Plan is not in force, the making of a determination by the Board of Equitas that, if the provisions of this part of this schedule were not invoked, the Relevant Original Liabilities of Equitas (taking into account, for the avoidance of doubt, its prospective and contingent liabilities and having made provision for the discharge of the General Creditors of Equitas in full in making such determination) would exceed the value of its Relevant Available Assets;

NOTE: see RRC 4, Sch. 3, §2.1(a).

in force: *cf.* RRC 4, §2.1(b) and RRC 5, §2.1(b) “in effect”.

the making of a determination by the Board:

General Creditors: see also for example RRC 5, Sch. 3, §§2.1(b), 4, 5.1(c), 12, 16; RRC 4, Sch. 3, §§2.1(a), 2.1(b), 5.1(c), 12.

- (b) at any time when a Retrocession Plan is in effect, the making of a determination by the Board of Equitas that, based on a current Retrocession Rate, the Relevant Original Liabilities of Equitas (taking into account, for the avoidance of doubt, its prospective and contingent liabilities and the Retrocession Rate then in force and having made provision for the discharge of its General Creditors in full, in making such determination) would exceed the value of its Relevant Available Assets.

NOTE: see RRC 4, Sch. 3, §2.1(b).

in effect: *cf.* RRC 4, §2.1(a) and RRC 5, §2.1(a) “in force”.

- 2.2 For the purposes of paragraph 2.1, the Board of Equitas shall be entitled to assume that the Relevant Available Assets shall be valued on the assumption that Equitas remains a going concern.

| **NOTE:** see RRC 4, Sch. 3, §2.2.

- 2.3 The circumstances described in clause 2.4 of the Agreement as Automatic Trigger Events are:-

- (a) the passing of a resolution for the voluntary winding-up of Equitas;

| **NOTE:** see RRC 4, Sch. 3, §2.3(a).

| **passing:** viz., by Equitas Re, Equitas Ltd.'s only member.

- (b) the making of an order for the compulsory winding-up of Equitas;

| **NOTE:** see RRC 4, Sch. 3, §2.3(b). Equitas Policyholders Trustee has no express contractual power to petition for such an order: cf. its RRC 7, §2.4 power in respect of Equitas Re.

- (c) the appointment of a provisional liquidator in respect of Equitas.

| **NOTE:** see RRC 4, Sch. 3, §2.3(c).

- 2.4 On the occurrence of a Certified Trigger Event, or upon the Board of Equitas becoming aware of facts or circumstances which it considers makes the occurrence of a Certified Trigger Event likely, the Board of Equitas shall be entitled, but not obliged, to consult with Insurance Creditors, or any part of them, or representatives of such Insurance Creditors, or any part of them as the Board of Equitas may see fit, in connection with the setting of a Retrocession Rate, the suspension of payments, or such other matters as the Board of Equitas may in its sole discretion determine.

| **NOTE:** see RRC 4, Sch. 3, §2.4.

Effect of Proportionate Cover

| **NOTE:** see RRC 4, Sch. 3, §3.1.

- 3.1 On the occurrence of a Trigger Event, the liabilities of Equitas to ERL in respect of the Retrocession Indemnities shall be adjusted in such a manner that they are equal to the aggregate of:

| **shall:** see RRC 4, Sch. 3, §3.1. And see RRC 5, Sch. 3, §8.2: Equitas Ltd.'s board may be free not to implement a Retrocession Rate at all.

| **adjusted:** Equitas Ltd. promises that it will decide (to the extent that it has any discretion in the matter) "bona fide" to adjust its RRC 5, §2 retrocession liabilities and that all reasonable skill, care and diligence will be "taken" in deciding whether to adjust: see RRC 4, §3.6.

- (i) the Original Liability multiplied by the Retrocession Rate, as calculated in accordance with paragraph 6 of this schedule; and

- (ii) the relevant Adjustment Entitlement (if any).

- 3.2 Any adjustment pursuant to the occurrence of a Certified Trigger Event shall take effect on and with effect from the date specified in the relevant Interim Retrocession Declaration which shall be issued by Equitas promptly following the occurrence of a Certified Trigger Event.

| **Interim Retrocession Declaration:** on the final Retrocession Declaration, see §7.

- 3.3 Any adjustment pursuant to the occurrence of an Automatic Trigger Event shall take effect on and with effect from, as the case may be:

| **NOTE:** see RRC 5, Sch. 3, §8.1(b).

- (i) the date of the resolution for the voluntary winding-up of Equitas;

- (ii) the date of the order for the compulsory winding-up of Equitas; or

- (iii) the date of the appointment of a provisional liquidator in respect of Equitas.

Plan may be invoked more than once

| **NOTE:** see RRC 4, Sch. 3, §4.

4. The provisions of clause 2.4 of the Agreement and this schedule 3 may be invoked more than once and appropriate adjustments (upwards or downwards) to any Retrocession Plan then in effect made on each occasion provided (for the avoidance of doubt) that no Retrocession Plan shall provide for the payment of any liability of Equitas (whether an Original Liability or an amount due to General Creditors) at a rate in excess of 100%.

Implementation of Retrocession Plan

NOTE: see RRC 4, Sch. 3, §5.

- 5.1 If a Certified Trigger Event occurs Equitas shall, subject to paragraph 8, implement a Retrocession Plan or, as the case may be, adjust a Retrocession Rate of a Retrocession Plan then in effect. For this purpose, Equitas shall determine as of the Record Date:

NOTE: see RRC 4, Sch. 3, §5.1.

shall ... implement: viz., implement all its elements in relation to all EquitasRe-assureds-at-Lloyd's, in both cases uniformly rather than selectively

For this purpose, Equitas shall determine as of the Record Date: RRC 4, Sch. 3, §5.1 says "For this purpose, ERL shall without undue delay determine as of the Record Date".

- (a) the value of the Available Assets and, separately, the value of the US Trust Assets, the ECTF Assets and the Australian Custody Assets, respectively;
 - (b) the amount of the Original Liabilities and, separately, the amount of the Relevant Original Liabilities applicable to American Business, Canadian Business, Australian Business and Residual Business, respectively (adjusted to reflect any Retrocession Rate already in force, if relevant); and
 - (c) the amount owing to General Creditors,
- together with such other determinations as Equitas shall consider appropriate.
- 5.2 Equitas undertakes to supply to ERL promptly, at the request of ERL, details of any valuations and other determinations it has made under paragraph 5.1, together with such reasonable supporting evidence and data as ERL may require.
- 5.3 For the avoidance of doubt, Equitas shall only be entitled to implement or adjust, as the case may be, a Retrocession Plan in respect of all, and not part only, of the Reinsurance Indemnities, in force at the relevant time.

Setting Retrocession Rate

NOTE: see RRC 4, Sch. 3, §6.

- 6.1 The Retrocession Rates applicable to the American Business, the Canadian Business, the Australian Business and the Residual Business (or any of them) as the case may be, shall be calculated in accordance with the following principles:

NOTE: see RRC 4, Sch. 3, §6.1.

- (a) The following rates shall be calculated:-
 - (i) Residual Business Rate;
 - (ii) US Trust Rate;
 - (iii) ECTF Rate; and
 - (iv) (if applicable) the Australian Rate.
- (b) where all of the US Trust Rate, ECTF Trust Rate and Australian Trust Rate are higher than the Residual Business Rate, then the rates calculated in accordance with paragraph 6.1(a) shall be the Retrocession Rate applicable to the Residual, American, Canadian and Australian Business respectively;

Australian Trust Rate: that term is not used in RRC 5. Presumably error for "Australian Rate".

shall be the Retrocession Rate applicable to the Residual, American, Canadian and Australian Business respectively: cf. RRC 4, Sch. 3, §6.1(b).

- (c) where some, but not all, of the US Trust Rate, ECTF Trust Rate and Australian Rate are higher than the Residual Business Rate, then the relevant higher rate or rates shall be the Retrocession Rate applicable to the American, Canadian or Australian Business, as the case may be;

shall be the Retrocession Rate applicable to the American, Canadian or Australian Business: cf. RRC 4, Sch. 3, §6.1(c).

- (d) subject, always to sub-paragraph (c) above, where all or any of the US Trust Rate, ECTF Trust Rate and Australian Rate is lower than the Residual Business Rate, then the rate or rates which

is lower shall be adjusted upwards and the Residual Business Rate will be adjusted downwards (by calculating the weighted average of the Residual Business Rate and such lower rate or rates) until such lower rate or rates and the Residual Business Rate have been equalised into a single rate which rate shall be the Retrocession Rate applicable to those classes of business only.

subject, always: *cf.* no comma in RRC 4, Sch. 3, §6.1(d).

- 6.2 Where Equitas is satisfied that, in any particular jurisdiction, insurance creditors will be paid from a fund of assets only available to pay such creditors (whether held on trust or otherwise), Equitas shall be entitled to take this into account in calculating the Residual Business Rate including, where necessary, calculating an additional specific rate or rates applicable to such jurisdictions consistent with the principles set out in paragraph 6.1 above.

NOTE: see RRC 4, Sch. 3, §6.2.

insurance creditors: presumably error for “Insurance Creditors”; see similarly RRC 5, Sch. 2, §3.1.

- 6.3 For the avoidance of doubt, the Board of Equitas shall be entitled to consult with such regulatory authorities as it considers appropriate with a view to implementing a Retrocession Plan and any revision thereto and, in particular, ensuring that Dedicated Assets are applied in the manner and at the rate contemplated by the Retrocession Plan and not otherwise.

NOTE: see RRC 4, Sch. 3, §6.3.

Declaration of Retrocession Rates

7. Following the determination by Equitas of the Retrocession Rate or Rates in accordance with paragraph 6, Equitas shall promptly issue a Retrocession Declaration.

NOTE: see RRC 4, Sch. 3, §7. On the Interim Retrocession Declaration, see RRC 5, Sch. 3, §3.2.

Alternative Remedies

NOTE: see RRC 4, Sch. 3, §8.

- 8.1 If the Board considers that they are unable, for whatever reason, to make any determination required for the purposes of paragraphs 5 and 6, Equitas shall be entitled:

NOTE: *cf.* RRC 4, Sch. 3, §8.1 (“If ERL is put on notice that Equitas is ...”).

Board: RRC 5 (see also at *ibid.*, §8.2), does not define the term. “Board of Equitas” is presumably intended.

- (a) to take any action with a view to promoting a scheme of arrangement under section 425 of the Companies Act 1985 or a voluntary arrangement under Part I of the Insolvency Act 1986;

NOTE: and see RRC 4, Sch. 3, §8.1(a).

- (b) to take any action with a view to the winding-up of Equitas; or

- (c) to exercise any rights it may have to take advantage of any other insolvency, moratorium, reorganisation or reconstruction procedure (or any variation of any existing procedure) which may be available to authorised insurance companies at the time,

or, in connection with any of the above, to apply to the court for the appointment of a provisional liquidator of Equitas or to take any equivalent protective measures in any other jurisdiction or jurisdictions.

- 8.2 Nothing in schedule 3 shall be construed as limiting the right of the Board to take such action (including implementing any of the procedures specified in paragraph 8.1) as the Board may consider appropriate in any circumstances.

NOTE: see RRC 4, Sch. 3, §8.2. Presumably Equitas Ltd.’s board is therefore free not to implement a Retrocession Rate at all, or otherwise comply with any RRC 5, Sch. 3 provision.

Suspension of payments

NOTE: see RRC 4, Sch. 3, §9.

9. Promptly following the occurrence of a Certified Trigger Event, Equitas shall be entitled to reduce or suspend payments in respect of the Retrocession Indemnity pending any decision under paragraph 5, 6 or 8 provided that Equitas shall have no power to reduce or suspend payments in respect of any liabilities of Equitas other than in respect of the Retrocession Indemnity and such other li-

abilities shall continue to be payable in the ordinary course of business as and when they fall due. ERL agrees that if Equitas exercises the power conferred on it by this paragraph 9, it shall not, pending the implementation of any decision under paragraph 5, 6 or 8:

NOTE: *cf.* RRC 4, Sch. 3, §9 different wording.

Promptly following: RRC 4, Sch. 3, §9 reads “following”.

Equitas shall be entitled to reduce: *cf.* RRC 4, Sch. 3, §9.

Retrocession Indemnity: *cf.* Retrocession Indemnities at RRC 5, Sch. 3, §3.1.

- (a) take any step or proceeding against Equitas or its property (whether by way of demand, set-off, legal proceedings, execution of judgment, enforcement of security, arbitration proceedings or otherwise howsoever) in any jurisdiction whatsoever for the purpose of enforcing its rights under this Agreement or otherwise procuring the payment of any amount in respect of a Retrocession Indemnity or any part thereof; or
- (b) apply to the court under section 53 of the Insurance Companies Act 1982 for leave to petition for the winding-up of Equitas in accordance with the Insolvency Act 1986 or take or seek to take any action in accordance with any other statutory or common law powers available to such Name including, without limitation, section 122 of the Insolvency Act 1986.

section 122 of the Insolvency Act 1986: the text is at p.A111.

Entitlement upon liquidation

NOTE: see RRC 4, Sch. 3, §10.

- 10.1 Upon the occurrence of an Automatic Trigger Event the amount of the liability of Equitas to ERL in respect of the Relevant Retrocession Indemnity shall be calculated in accordance with the provisions of paragraph 6 of this schedule, and may be recalculated to the extent considered appropriate by any liquidator of Equitas. The amount for which ERL may prove in the liquidation of Equitas shall, accordingly, be limited by reference to the calculation and/or recalculation of the liabilities of Equitas following the application of this schedule.
- 10.2 Nothing in this paragraph 10 shall require a liquidator to act in a manner inconsistent with any applicable rule of law.

Entitlement upon section 425 plan being proposed

- 11. If Equitas proposes a compromise or arrangement within the terms of section 425 of the Companies Act 1985, or any successor thereto, at any time after a Certified Trigger Event has occurred, the amount of the liability of Equitas to ERL in respect of the Relevant Retrocession Indemnity (and accordingly the amount for which claims can be made in respect of such liability) shall be calculated in accordance with the provisions of this schedule unless and until the extent of such liability is varied by the terms of any such compromise or arrangement that may be approved.

NOTE: see RRC 4, Sch. 3, §11.

Subordination to General Creditors

- 12. ERL acknowledges and agrees that its right to receive any payment from Equitas shall be subordinated to (i) payment of the General Creditors in full; and (ii) payment of (or the making of appropriate provision for payment of) the expenses of a liquidation, a section 425 plan or such other insolvency, moratorium, reorganisation or reconstruction procedure (or any variation of any existing procedure) which may be available from time to time, as the case may be, in full.

NOTE: See RRC 4, Sch. 3, §12. On General Creditors, see also for example RRC 5, Sch. 3, §§2.1(a), 16.

appropriate provision for: RRC 4, Sch. 3, §12 reads “appropriate provisions for”.

or such other: RRC 4, Sch. 3, §12 reads “or other”.

moratorium, reorganisation: RRC 4, Sch. 3, §12 equivalent has no comma.

procedure) which may be available from time to time, as the case may be, in full: RRC 4, Sch. 3, §12 reads “procedure), as the case may be, in full”.

Upwards adjustment of payments

- 13. This paragraph applies where, at any time when a Retrocession Plan is in force, there is an upward adjustment in any Relevant Retrocession Rate. In such circumstances, where ERL has made pay-

ment under a Reinsurance Indemnity on the basis of a Relevant Retrocession Rate lower than the adjusted Relevant Retrocession Rate, Equitas shall be obliged to pay compensation to ERL. The compensation shall be such amount as is required to increase the level of payments already made to the same level as it is proposed to pay in respect of payments subject to the new adjusted Relevant Retrocession Rate.

NOTE: cf. the different provision at RRC 4, Sch. 3, §13.

Professional advice

14. In making any determination under this schedule, the Board of Equitas shall be entitled to rely on such professional advice as it considers appropriate and the determination of the Board of Equitas in respect of any matter in relation to clause 2.4, this schedule or a Retrocession Plan shall be conclusive and binding on all the Names. Without prejudice to clause 2.6 of this Agreement, no person shall have any claim against Equitas (or any officer, director or employee of Equitas) arising directly or indirectly out of any decision taken or omitted to be taken in relation to the application of this schedule.

NOTE: see RRC 4, Sch. 3, §14.

on all the Names: RRC 4, Sch. 3, §14 reads “on all the Names and the Closed Year Names”.

Notices

15. Any notice to be given under this schedule shall be given in accordance with the provisions of clause 22 of this Agreement.

NOTE: see RRC 4, Sch. 3, §15.

Indemnity to ERL

16. Equitas undertakes to indemnify ERL on demand and from time to time in respect of any liability of ERL to its General Creditors (as the term General Creditors is defined in the Equitas Reinsurance Contract), provided that:

NOTE: this provision has no analog in RRC 4. On General Creditors, see for example RRC 4, Sch. 3, §§2.1(a), 2.1(b), 5.1(c) and 12. On subordination to General Creditors over Insurance Creditors, see for example RRC 5, Sch. 3, §12 (subordination of Equitas Re) and RRC 4, Sch. 3, §12 (subordination of each EquitasRe-reinsured SYA participant).

- (a) ERL shall supply to Equitas such evidence as to the nature and amount of the liability in question as Equitas may reasonably require; and
- (b) Equitas shall have no liability under this indemnity at any time where a Proportionate Cover Plan is not in force or under consideration by the Board of ERL.

NOTE: on “Proportionate Cover Plan”, see RRC 4, Sch. 3.

Definitions

NOTE: the text of definitions from and including *Dedicated Assets to Illinois Retained Business* is taken from version FW962500.261/2+.]

17. For the purposes of this schedule, the following words and expressions have the following meanings:

Adjustment Entitlement means the right of ERL, if there is a Trigger Event leading to an upward adjustment of a Retrocession Rate, to receive (i) compensation in accordance with paragraph 13 of this schedule; and (ii) any entitlement to an increased Retrocession Rate in accordance with paragraph 2.1(b);

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §3.1(ii). The main part of RRC 5 does not have a §2.1(b), while *ibid.*, Sch. 3, §2.1(b) does not provide for any such entitlement.

American Business shall have the meaning given in the EATD;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§5.1(b), 6.1, 6.1(b), (c), §17 definition of “Relevant Available Assets”, “Relevant Original Liability”, “Relevant Retrocession Indemnities”, “Retrocession Rate”, “US Trust Rate”.

Australian Business shall have the equivalent meaning to that proposed to be given to the then “Australian Liabilities” in the EAUSCA;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§5.1(b), 6.1, 6.1(b), (c), §17 definition of “Relevant Available Assets”, “Relevant Original Liability”, “Relevant Retrocession Indemnities”, “Retrocession Rate”.

Australian Custody Assets means the aggregate of the assets administered pursuant to the EAUSCA;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §5.1(a).

Australian Rate means the rate at which the Australian Liabilities may be discharged from the Australian Trust Assets alone;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §§6.1(a)(iv), (b)?, (c), (d).

Automatic Trigger Event has the meaning set out in paragraph 2.3 of this schedule;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §§2.3, 3.3, 10.1.

Available Assets means the assets of Equitas as at the Record date less the amount of the General Creditors as at the Record date;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §5.1(a), §17 definition of “Non-Dedicated Available Assets”, “Original Liability”, “Record Date”, “Relevant Available Assets”, “Retrocession Rate”, “Residual Business Rate”.

| **Record date:** presumably error for “Record Date”.

Board of Equitas means the board of directors of Equitas;

| **NOTE:** for RRC 5 use, see *ibid.*, §1; Sch. 2, §1, definition of “Available Surplus”, “Deficit”, §3.1; Sch. 3, §§2.1(a), (b), 2.2, 2.4, 6.3, 14.

Canadian Business shall have the meaning given in the ECTD;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §§5.1(b), 6.1, §17 definition of “ECTF Rate”, “Relevant Available Assets”, “Relevant Original Indemnity”, “Relevant Retrocession Indemnities”, “Retrocession Rate”.

Certified Trigger Event has the meaning set out in paragraph 2.1 of this schedule;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §§2.1, 2.4, 3.2, 5.1, 9, 11.

Dedicated Assets means the aggregate of the US Trust assets, the ECTF Assets and the Australian Assets, or any of them, as the context may require;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §6.3, §17 definition of “Non-Dedicated Available Assets”.

| **US Trust assets:** presumably error for “US Trust Assets”.

EATD means the deed of trust to be entered into by Equitas and ERL with Citibank, N.A. as trustee, in favour of the trustee of the LATD, as may be amended from time to time;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §17, definition of “American Business”, “EATF”.

EATF means the trust fund from time to time held under the terms of the EATD;

| **NOTE:** for RRC 5 use, see *ibid.*,

EAusCA means the custodian agreement proposed to be entered into by Equitas with the responsible authorities in Australia in connection with the revised trading arrangements proposed to be established there;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §17 definition of “Australian Business”, “Australian Custody Assets”.

EAusTF means the trust fund proposed to be established pursuant to the EAusTA;

| **NOTE:** the term is not used in RRC 5.

| **EAusTA:** there is no such defined term; “EAusCA” is presumably meant.

ECTD means the deed of trust to be entered into by Equitas and ERL with the Royal Trust Corporation of Canada as trustee, in favour of the trustee of the LCTD, as may be amended from time to time;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §17 definition of “Canadian Business”, “ECTF”.

ECTF means the trust fund from time to time held under the terms of the ECTD (together with such amounts, if any, as are held in the LCTF and are available only for the discharge of 1992 and Prior Business);

| **NOTE:** the term *simpliciter* is not used in RRC 5.

ECTF Assets means the aggregate of the assets in the ECTF;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §5.1(a), §17 definition of “Dedicated Assets”.

ECTF Rate means the rate at which liabilities applicable to Canadian Business may be discharged from ECTF Assets alone;

| **NOTE:** for RRC 5 use, see *ibid.*, Sch. 3, §6.1(a)(iii).

General Creditors means all persons who are creditors (actual, prospective or contingent) of Equitas, ERL or any other member of the Equitas Group (other than ERL under the Retrocession Indemnities) and where the context requires, references to General Creditors shall include references to the amount of the claims (actual, prospective or contingent) of General Creditors. For the avoidance of doubt, references to claims of General Creditors include the estimated costs, at any time, of the future business of Equitas, ERL or any other member of the Equitas Group carried out pursuant to this Agreement or the Equitas Reinsurance Contract;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§2.1(a), (b), 4, 5.1(c), 12 heading, 16. Arguably this definition (unlike its RRC 4, Sch. 2, §1 counterpart) does not exclude the Equitas Re-insured SYA participant.

any other member of the Equitas Group: viz., including Equitas Policyholders Trustee: see RRC 7, §2.7(a).

Illinois Collateral Reinsurance means the contract for the reinsurance of the Illinois Retained Business of Names and Closed Year Names authorised by a Certificate of Authority to write certain classes of insurance business in the State of Illinois made between ERL, such Names and Closed Year Names, and the Substitute Agent;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §17 definition of “Illinois Trust Fund”.

Illinois Retained Business shall have the meaning given in the Illinois Collateral Reinsurance;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §17 definition of “US Trust Rate”.

Illinois Trust Fund means the trust to be established in respect of the Illinois Collateral Reinsurance by ERL in accordance with Section 173.1 of the Illinois Insurance Code and §1104.70 of the Illinois Insurance Department Regulations;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §17 definition of “US Trust Assets”.

Interim Retrocession Declaration means a notice or advertisement issued by or under the direction of the Board stating that a Certified Trigger Event has occurred and the date of such event and whether suspension of payments in respect of Retrocession Indemnities will come into effect;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §3.2.

LATF means any trust fund from time to time held in respect of a Name under the terms of the Lloyd’s American Trust Deed;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §17 definition of “US Trust Assets”.

LATD or Lloyd’s American Trust Deed means the instrument dated 21 December 1995 constituting the amended and restated Lloyd’s American Trust Deed, as amended from time to time;

NOTE: for RRC 5 use of “LATD”, see *ibid.*, Sch. 3, §17 definition of “EATD”. For RRC 5 use of “Lloyd’s American Trust Deed”, see *ibid.*, Sch. 3, §17 definition of “LATF”.

LCTD means the instrument dated 26 September 1995 constituting the amended and restated Lloyd’s Canadian Trust Deed, as amended from time to time;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §17 definition of “ECTD”.

Non-Dedicated Available Assets means the Available Assets of Equitas less the aggregate of (i) the Dedicated Assets (but adding back so much of the Dedicated Assets as Equitas determines are available to it to meet Original Liabilities in respect of Residual Business, because of a surplus of assets in the relevant trust fund, or otherwise, as the case may be), and (ii) so much of the Available Assets of Equitas as Equitas determines are required to discharge the specific liabilities identified in clause 3.3;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §17 definition of “Original Liabilities”, “Residual Business Rate”.

Original Liability means the net present value, discounted at the prevailing discount rate, of the amount of the unsatisfied liability (actual, prospective or contingent) which Equitas would have had to ERL at the Record Date in respect of the Retrocession Indemnities if no Retrocession Plan had ever been implemented, but leaving out of account all or part or any liability in respect of which a dedicated asset is available as referred to in sub-paragraph (ii) of the definition of Non-Dedicated Available Assets;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§3.1, 4, 17 definition of “Relevant Original Liability”.

part or: presumably error for “part of”.

dedicated asset: presumably error for “Dedicated Asset”: see the RRC 5, Sch. 3, §17 definition of “Non-Dedicated Available Assets”.

[R: terms beginning with “r” are not all in alphabetical sequence — *Ed.*]

Retrocession Declaration means a notice or advertisement issued by Equitas stating that a Retrocession Plan has been implemented or adjusted and stating: the effective date of coming into effect of the Retrocession Plan or, as the case may be, the effective date of the adjustment to such Retrocession Plan; the Retrocession Rate or Rates; whether ERL will be entitled to payments under paragraph 13;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §7. And see RRC 5, Sch. 3, §17 definition “Interim Retrocession Declaration”.

Retrocession Plan means an adjustment of the liabilities of Equitas in respect of the Retrocession Indemnities to ERL in accordance with clause 2.4. and this schedule;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3 heading; *ibid.*, §1 heading; *ibid.*, §§1, 2.1(a), (b), 4, 5.1 heading, 5.1, 5.3, 6.3, 13, 14, 17 definition of “Original Liability”, “Retrocession Rate”.

Retrocession Rate means the percentage rate by which the Original Liabilities, or a relevant part of them, must be multiplied in order for Equitas to be able to discharge the Original Liabilities from the Available Assets, and as the same may be calculated separately for American, Canadian, Australian and Residual Business (where applicable) in accordance with paragraph 6.1 of this schedule;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§2.1(b), 2.4, 3.1(i), 5.1, 5.1(b), 6.1 heading, 6.1, 6.1(b), (c), (d), 7 heading, 7, 17 definition of “Adjustment Entitlement” and “Retrocession Declaration”. And see RRC 5, Sch. 1, §1 definition of “Relevant Retrocession Rate”.

Record Date means the date on which a valuation of Available Assets and Original Liabilities takes place for the purposes of paragraph 5.1;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§5.1, 17 definition of “Available Assets”?, “Original Liability”.

Retrocession Indemnities means the indemnity to ERL contained in clause 2.3;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§3.1, 17 definition of “General Creditors”, “Interim Retrocession Declaration”, “Original Liability”, “Retrocession Plan”, “Relevant Retrocession Indemnities”.

Relevant Available Assets means so much of the Available Assets as are available to discharge liabilities applicable to American Business, Canadian Business, Australian Business and Residual Business, as the case may be;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§2.1(a), (b), 2.2.

Relevant Original Liability means so much of the Original Liability as relates to the Relevant Retrocession Indemnities applicable to the American Business, Canadian Business, Australian Business and Residual Business, as the case may be;

NOTE: the term is not used in RRC 5 as extracted.

Relevant Retrocession Indemnities means the portion of the Retrocession Indemnity applicable to the American Business, Canadian Business, Australian Business and Residual Business, as the case may be;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §17 definition of “Relevant Original Liability”.

Residual Business Rate means the rate at which Equitas can discharge its Relevant Original Liabilities in respect of Residual Business from its Non-Dedicated Available Assets;

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§6.1(a)(i), (b), (c), (d), 6.2.

US Trust Assets means the aggregate of the assets in the EATF and such amounts, if any, as are held in the LATF and are available only for the discharge of 1992 and Prior Business (excluding, for the avoidance of doubt, the Illinois Trust Fund); and

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§5.1(a), 17 definition of “US Trust Rate”.

US Trust Rate means the rate at which liabilities applicable to American Business (excluding for this purpose, Illinois Retained Business) may be discharged from US Trust Assets alone.

NOTE: for RRC 5 use, see *ibid.*, Sch. 3, §§6.1(a)(ii), (b), (c), (d).

SIGNED by:

for and on behalf of
EQUITAS REINSURANCE LIMITED

SIGNED by:

for and on behalf of
EQUITAS LIMITED

Appendix 1.4

Equitas Policyholders Trustee trust deed (RRC 7)

INTRODUCTORY NOTE

A1.4-1 RRC 7 should be read in conjunction with RRC 4, especially *ibid.*, §4.6 etc. Equitas Policyholders Trustee (not to be confused with the seven unincorporated EquitasRe-reinsurance Trustees) is (broadly speaking) the assignee of EquitasRe-reinsured SYA participants' RRC 4 rights against Equitas Re. RRC 7, to which only Equitas Policyholders Trustee is a party,¹ prescribes and regulates (supplementarily to its own Memorandum and Articles of Association) the company's relevant functions and powers. Neither Equitas Policyholders Trustee nor its trust fund is itself (unlike, for example, the Central Fund) a source of recourse but merely (and only to the extent each Insurance Creditor remains unpaid in the first place): (1) a back-office interposition, supposedly for "policyholder protection",² between Equitas Re's relevant available assets, if any, and every EquitasRe-reinsured SYA participant. The capital and income values of any RRC 7 "Trust Property"³ are thus diverted away from EquitasRe-reinsured SYA participants and directed towards (though not necessarily ever received by) relevant unpaid EquitasRe-assureds-at-Lloyd's. RRC 7 and Equitas Policyholders Trustee supposedly give a degree of comfort to EquitasRe-assureds-at-Lloyd's as a class that, in a relevant event, such assets would not somehow be transmitted directly to any EquitasRe-reinsured SYA participant in preference to them; (2) a proxy for EquitasRe-assureds-at-Lloyd's as a class — RRC 4 and RRC 7 "Insurance Creditors" — in certain Equitas Re insolvency situations. RRC 7 particularly empowers Equitas Policyholders Trustee to prove in Equitas Re's liquidation of on behalf of known individual Insurance Creditors.⁴ Equitas Re is expressly empowered to prove similarly in Equitas Ltd.'s insolvency.⁵

¹ RRC 7's adherence to the other parties it purports to bind is achieved through RRC 4, §4.6.

² RRC 4, §4 heading.

³ See RRC 7, §2. Cf. RRC 17, §1.1 "Trust Property".

⁴ See for example RRC 7, §2, especially *ibid.*, §2.6.

⁵ See for example RRC 5, Sch. 2, §3.2, and *ibid.*, Sch. 3, §10.1.

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FORM OF DECLARATION OF TRUST [RRC 7]

[This is RRC 4, App. 1. Unless otherwise stated, this is version FW962500.261/2+]

THIS DECLARATION OF TRUST is made on 2 September 1996

2 September: *sic* in the version used. *Cf.* RRC 4, §4.6, which requires Equitas Policyholders Trustee to enter into RRC 7 on “the date hereof”, which is September 3, 1996. See also RRC 4, §4.5.

BY:

EQUITAS POLICYHOLDERS TRUSTEE LIMITED of 20-22 Bedford Row, London WC1R 4JS (the *Trustee*, which expression shall include such company and any other person or persons acting as trustee for the time being of this Declaration of Trust).

NOTE: Equitas Policyholders Trustee, a party to RRC 4 (as “the Trustee”), entered into RRC 7 further to its RRC 4, §4.6 obligation. Though Equitas Policyholders Trustee is RRC 7’s only party, RRC 7 extends to and seeks to impose obligations directly on Equitas Ltd. (as at, for example, *ibid.*, §7). Equitas Ltd. is expressly required to comply with RRC 7: RRC 4, §4.6.

20-22 Bedford Row, London WC1R 4JS: obsolete: its current registered office is 33 St. Mary Axe, London EC3A 8LL.⁷

any other person or persons: that is, any other person holding office as RRC 7 trustee: Equitas Policyholders Trustee — that is, the company of that name which happens to be governed by its own memorandum and articles of association for the time being — is not entitled to be the sole or only RRC 7 trustee.

WHEREAS:

- (A) This Declaration of Trust is made pursuant to the Reinsurance Contract (as defined below) pursuant to which ERL has agreed to reinsure and indemnify the Reinsured Names in relation to 1992 and Prior Business on the terms and conditions set out in the Reinsurance Contract.

NOTE: for the defined terms, see RRC 7, §1.1.

is made pursuant to the Reinsurance Contract: see RRC 4, §4.6.

the Reinsurance Contract: *viz.*, RRC 4.

⁶ Editorially added.

⁷ Equitas Policyholders Trustee’s August 29, 2001 363s annual return as at August 23, 2001.

- (B) Under the Reinsurance Contract, each Reinsured Name has assigned absolutely by way of first fixed mortgage to the Trustee all right, title, benefit and interest which he has or may have against ERL in relation to:

NOTE: for the defined terms, see RRC 7, §1.1.

assigned: see RRC 4, §4.1 *et seq.*

by way of first fixed mortgage: see RRC 4, §4.3.

- (a) the performance of the Reinsurance Obligation (as defined in the Reinsurance Contract) of ERL in accordance with clause 3 of the Reinsurance Contract including, without limitation:

NOTE: the assignment was made in RRC 4, §4.3 read with (for example) *ibid.*, §4.1(a).

- (i) any right to receive damages from any person in respect of such rights; and

NOTE: the assignment was made in RRC 4, §4.3 read with (for example) *ibid.*, §4.1(a)(i).

damages: see RRC 4, §4.1(a)(i).

- (ii) any rights in a winding-up of ERL or pursuant to any scheme or composition entered into between ERL and its creditors including any scheme of arrangement or compromise made under section 425 of the Companies Act 1985 and any voluntary arrangement made between ERL and its creditors under sections 1 to 8 of the Insolvency Act 1986; and

NOTE: the assignment was made in RRC 4, §4.3 read with (for example) *ibid.*, §4.1(a)(ii).

winding-up of ERL: see for example RRC 4, Sch. 3, §10.

- (b) any return of premium payable on a winding-up pursuant to any scheme or composition entered into between ERL and its creditors to the extent that the Secured Obligations have not been satisfied in full,

NOTE: the assignment was made in RRC 4, §4.3 read with (for example) *ibid.*, §4.1(b).

but not including such rights, title, benefit and interest in the Reinsurance Obligation which are excluded from the assignment under the terms of the Reinsurance Contract, as security for the discharge and payment of the Secured Obligations, on the terms that the Trustee should hold such property assigned to it pursuant to a Declaration of Trust on the terms set out herein.

which are excluded from the assignment under the terms of the Reinsurance Contract: for these reservations, see RRC 4, §4.2.

- (C) The Trustee has agreed to act as trustee for the purposes of this Declaration of Trust upon the terms and subject to the conditions set out herein.

NOW IT IS HEREBY DECLARED as follows.

INTERPRETATION

- 1.1 Definitions: In this Declaration of Trust and the Recitals hereto the following words and expressions have, except where the context otherwise requires, the meanings respectively shown opposite them:

1992 and Prior Business means all liabilities under contracts of insurance underwritten at Lloyd's (other than life business) and originally allocated to the 1992 year of account or any earlier year of account including, without limitation, any such liabilities reinsured to close into the 1993 or any later year of account but excluding any liabilities re-signed, or re-allocated pursuant to a premium transfer, into 1993 or any later year;

NOTE: for RRC 7 use, see *ibid.*, recital (A) and *ibid.*, §1.1, definition of "Insurance Creditor", "Reinsurance Contract".

the 1992 year of account: error for "participants on any SYA budding in the 1992 underwriting year".

earlier year of account: error for "earlier underwriting year".

reinsured to close into the 1993 or any later year of account: error for "reinsured to close by participants on SYAs budding in the 1993 or in any later UY": RRC 4, Sch. 1 lists 240 SYAs budding in the 1993 UY and 2 budding in the 1995 UY.

Authorised Investments means any investment authorised by English law for the investment by trustees of trust moneys or in any other investment which may be selected by the Trustee as if the Trustee were an absolute beneficial owner of the Trust Property;

NOTE: for RRC 7 use, see *ibid.*, §2.16.

Closed Year Names means in respect of any Closed Year Syndicate, those members of Lloyd's who were members of that Closed Year Syndicate acting in their capacity as members of the Closed Year Syndicate;

NOTE: for RRC 7 use, see *ibid.*, §1.1, definition of "Reinsurance Contract", "Reinsured Names". Because of conventional outward-RTC's comprehensive, absolute, irrevocable extrication effect, "Closed Year Names" have no relevant liabilities.⁸

Closed Year Syndicate means any Syndicate constituted for any 1992 or prior year of account which has been reinsured to close either directly or indirectly into any Syndicate or Centrewrite;

NOTE: for RRC 7 use, see *ibid.*, §1.1, definition of "Closed Year Names", "Insurance Creditor", §2.3.

Syndicate constituted for any 1992 or prior year of account: error for "SYA budding in the 1992 or any prior UY". And see the relevant annotations to RRC 7, §1.1's definition of "1992 and Prior Business".

which: error: a syndicate does not have participants and is not and cannot be RTCed: see the annotation to RRC 7, §1.1, definition of "syndicate".

this Declaration of Trust means this Declaration of Trust as amended or modified from time to time, including any other declaration, deed or instrument expressed to be supplemental hereto;

Equitas means Equitas Limited, a limited company registered in England and Wales with company number 3173352 whose registered office is at 20-22 Bedford Row, London WC1R 4JS;

NOTE: for RRC 7 use, see *ibid.*, §§2.14, 7.1(a), (b), (c), 7.2, 7.3, 7.4, 14.

Equitas Limited: Equitas Ltd. is discussed elsewhere.⁹

20-22 Bedford Row, London WC1R 4JS: obsolete: Equitas Ltd.'s registered office is presently 33 St. Mary Axe, London EC3A 8LL.¹⁰

Equitas Holdings Limited means Equitas Holdings Limited, a limited company registered in England and Wales with company number 3136296 whose registered office is at 20-22 Bedford Row, London WC1R 4JS;

NOTE: see for RRC 7 use, see *ibid.*, §9.1.

Equitas Holdings Limited: Equitas Holdings is discussed elsewhere.¹¹

20-22 Bedford Row, London WC1R 4JS: obsolete: Equitas Holdings' registered office is presently 33 St. Mary Axe, London EC3A 8LL.¹²

ERL means Equitas Reinsurance Limited, a limited company registered in England and Wales with company number 3136300 whose registered office is at 20-22 Bedford Row, London WC1R 4JS;

NOTE: for RRC 7 use, see *ibid.*, recital (A), (B), (B)(a), (B)(a)(ii), (B)(b), §1.1, definition of "Reinsurance Contract", "Secured Obligations", §§2.2, 2.2(a), 2.3, 2.4, 2.5, 2.6, 2.7(b), (d), 2.10, 2.11, 2.15(a), (b), (c), (c)(ii), (d), 2.17, 6.1, 6.3, 7.3(a), 9.1, 9.2, 10, 12.1(c).

Equitas Reinsurance Limited: Equitas Re is discussed elsewhere.¹³

20-22 Bedford Row, London WC1R 4JS: obsolete: Equitas Re's registered office is presently 33 St. Mary Axe, London EC3A 8LL.¹⁴

Insolvency Event means any of the events specified in clause 2.15 of this Declaration of Trust;

NOTE: RRC 7, §2.15 deals with the insolvency only of Equitas Re, not Equitas Ltd. For RRC 7 use, see *ibid.*, §§2.2, 2.3, 2.4, 2.5, 2.7, 2.15.

Insurance Creditor means any policyholder under any contract of insurance underwritten by a Syndicate or Closed Year Syndicate liabilities under which are comprised in 1992 and Prior Business other than a member or former member of Lloyd's who is such a policyholder in his capacity as an underwriter of insurance business at Lloyd's;

NOTE: the definition is identical to that at RRC 4, Sch. 2, §1: the EquitasRe-assured-at-Lloyd's is an Insurance Creditor of Equitas Re under RRC 4, and an Insurance Creditor of Equitas Policyholders Trustee under RRC 7. For RRC 7 use, see *ibid.*, §§2.2,

⁸ See RRC 4, §3.3.

⁹ See p.39.

¹⁰ Equitas Ltd. 363s December 11, 2001 annual return as at December 5, 2001, p.1.

¹¹ See p.19.

¹² Equitas Holdings 363s December 11, 2001 annual return as at December 5, 2001, p.1.

¹³ See p.26.

¹⁴ Equitas Re 363s December 11, 2001 annual return as at December 5, 2001, p.1.

2.2(a), (b), 2.3, 2.4, 2.5, 2.6, 2.7(b), (c), 2.8, 2.9, 2.10, 2.11, 2.14, 2.16, 3.2, 6.1, 6.3, 7.6, 9.2(a), 11(c). The term should be read with RRC 7, §1.1's definition of "Secured Obligations": an "Insurance Creditor" is a beneficiary of the "Secured Obligations". RRC 7 seeks expressly to prevent him from making a claim against Equitas Policyholders Trustee in certain circumstances: *ibid.*, §§2.8 and 2.16; and see *ibid.*, §6.1. But RRC 7 does give the Insurance Creditor (not a party to RRC 7 and the subject of RRC 4, §3.7 and RRC 5, §2.6 express exclusions) various procedural roles (which he would not necessarily know about) such as (for example): RRC 7, §2.2 (providing Equitas Policyholders Trustee with evidence of Equitas Re's breach of RRC 4, §3); *ibid.*, §2.2(a) (providing evidence of his identity); *loc. cit.* and *ibid.*, §2.11 (providing written confirmation that relevant sums will be applied to reduce or extinguish EquitasRe-reinsured liabilities); *ibid.*, §2.4 (providing a written notice that an Insolvency Event has occurred); *ibid.*, §2.6 (providing information and "sufficient evidence" as to how much is owed to him).

underwritten by a Syndicate or Closed Year Syndicate: illustrates the infelicity of RRC 4, Sch. 2, §1's definition of "Syndicate" and "Closed Year Syndicate".

life business has the meaning ascribed to long term business in the Insurance Companies Act 1982;

NOTE: for RRC 7 use, see *ibid.*, §1.1, definition of "1992 and Prior Business".

Lloyd's means the Society incorporated by Lloyd's Act 1871 by the name of Lloyd's;

NOTE: infelicitous: the Corporation is not a society.¹⁵ For RRC 7 use, see *ibid.*, §1.1, definition of "1992 and Prior Business", "Closed Year Names", "Insurance Creditor", "Reinsurance Contract", "syndicate"; §§1.2(g)(i), (ii), (iii).

Names means the members of a Syndicate for the underwriting year as set out in the Syndicate List acting in their capacity as members of such Syndicate;

NOTE: multiply infelicitous: see RRC 4, Sch. 2, §1 definition of "Names". For RRC 7 use, see *ibid.*, recital (A), §1.1, definition of "Reinsurance Contract", "Reinsured Names", §§2.3, 2.14. And see "Closed Year Names".

underwriting year: error for "year of account": see annotation to RRC 4, Sch. 2, §1.1 definition of "syndicate" and "Syndicate".

Proportionate Cover Plan means a plan of such name introduced pursuant to clause 3.5 and schedule 3 to the Reinsurance Contract;

NOTE: for RRC 7 use, see *ibid.*, §§2.10, 2.15(c)(i), (ii), 2.17.

Reinsurance Contract means the contract dated on or about the date hereof entered into between inter alia ERL, the Names, the Closed Year Names, the Substitute Agent, Lloyd's, Equitas Limited and the Trustee pursuant to which ERL agrees to reinsure and indemnify the Syndicates in relation to the Syndicate 1992 and Prior Business of each Syndicate;

NOTE: "Reinsurance Contract" is called RRC 4 in this work. For RRC 7 use, see *ibid.*, recitals (A), (B), (B)(a), (B)(b); §1.1, definition of "Proportionate Cover Plan", "Secured Obligations", "Substitute Agent", "Syndicate", "Trust Property"; §§2.2, 2.2(a), (b), 2.3, 2.4, 2.6, 2.11, 2.13, 2.15(a), 2.15(c)(iii), 2.17, 3.1(a), (b), 3.2, 5(a), (c), (e), (h)(i), (ii), (iii), 6.1, 6.2, 6.4, 7.2, 7.3(a), (b), 9.2, 11(d), 12(c), 13.

Equitas Limited: RRC 7, §1.1, definition of "Equitas", which already shortens "Equitas Limited" to "Equitas".

Reinsured Names means the Names and the Closed Year Names;

NOTE: for RRC 7 use, see *ibid.*, recital (A), §1.1 definition of "Trust Property", §§2.8, 2.10, 6.1, 9.2(a). The term is used but not defined in RRC 4. The definition is erroneous: Equitas Re does not under RRC 4, §3 or any other provision sell reinsurance (or anything else) to any Closed Year Name.¹⁶

Secured Obligations means all moneys and liabilities (including contingent liabilities) whatsoever which may be due, owing or payable by any Name or any Closed Year Name under any contract of insurance or reinsurance which has been reinsured by ERL under the terms of the Reinsurance Contract;

NOTE: should be read with the definition of "Insurance Creditors", above. For RRC 7 use, see *ibid.*, recital (B), (b)(b), §§2.6, 2.7, 2.7(b), (c), 2.8, 2.10, 2.12, 2.13, 3.1(a), 3.2, 6.1.

Substitute Agent means, in respect of the Reinsurance Contract, the person who has entered into such contract as substitute managing agent on behalf of the Syndicates, being the person appointed as substitute managing agent of such Syndicates pursuant to a direction of the Council under the Substitute Agents Byelaw (No. 20 of 1983) and any successor managing agency or substitute managing agent;

NOTE: the Substitute Agent is presently AUA 9.¹⁷ For RRC 7 use, see *ibid.*, §1.1, definition of "Reinsurance Contract", §§2.2, 2.2(b), 2.3, 2.8, 2.9, 2.14, 2.16.

on behalf of the Syndicates: The Substitute Agent does not act on behalf of any syndicate but solely on behalf of relevant EquitasRe-reinsured SYA participants.

¹⁵ See p.184.

¹⁶ See RRC 4, §3.3.

¹⁷ See p.A30.

syndicate means a group of underwriting members of Lloyd's, to which a particular number is assigned by or under the authority of the Council, for whose account an active underwriter accepted or accepts insurance business at Lloyd's;

NOTE: an infelicitous definition: (1) a syndicate is not a SYA; (2) a SYA is not its participants; (3) each participant on a particular SYA trades severally: though their individual accounts are collectivised, they are not aggregated: see annotation to RRC 4, Sch. 2, §1.1 definition of "syndicate". For RRC 7 use, see *ibid.*, §1.1, definition of "Syndicate".

Syndicate means each of the syndicate years of account listed in schedule 1 to the Reinsurance Contract;

NOTE: an infelicitous definition: see annotation to RRC 4, Sch. 2, §1.1 definition of "Syndicate". For RRC 7 use, see *ibid.*, §1.1, definition of "Closed Year Syndicate", "Insurance Creditor", "Names", "Reinsurance Contract", "Substitute Agent", §2.3.

Trust Corporation means a corporation entitled by rules made under the Public Trustee Act 1906 to act as a custodian trustee; and

NOTE: the term is not used in RRC 7. For RRC 7 lower-case use, see *ibid.*, §8, 9.2.

Trust Property means all the property, assets and rights (whether present, future, prospective or contingent) of Reinsured Names assigned to the Trustee pursuant to clause 4.1 of the Reinsurance Contract.

NOTE: this should be read with RRC 4, §4.1's "Assigned Property", which relates only to Equitas Re's *ibid.*, §3 reinsurance obligations, not its *ibid.*, §9 run-off agency functions. For RRC 7 use, see *ibid.*, §1.1, definition of "Authorised Investments", §§2.1, 2.3, 2.4, 2.5, 2.7(d), 2.8, 2.13, 2.14, 2.16, 4.1, 6.1, 11(d), 14. Cf. RRC 17, §1.1 Trust Property. For the terms on which Equitas Policyholders Trustee is required to hold the Trust Property, see RRC 4, §4.6.

1.2 Construction: In this Declaration of Trust, except where the context otherwise requires:

- (a) clause headings are for ease of reference only;
- (b) references to clauses, sub-clauses or paragraphs are, unless otherwise specified, to be construed as references to clauses, sub-clauses and paragraphs of this Declaration of Trust;
- (c) references to any statute or other legislative provision shall include any statutory or legislative modification or re-enactment thereof, or any substitution therefor;

NOTE: the provision does not extend to future versions of the byelaw mentioned in RRC 7 (*viz.*, at *ibid.*, §1.1, definition of "Substitute Agent"). Cf. RRC 7, §1.2(c)'s equivalent at RRC 4, Sch. 2, §2(c).

- (d) references to documents include any deed (including this Declaration of Trust), negotiable instrument, certificate, notice or other document of any kind and references to any document (or a provision therefor) shall be construed as a reference to that document or provision as from time to time amended, supplemented, varied or replaced (in whole or in part);
- (e) references to the word "person" or "persons" include, without limitation, individuals, firms, corporations, government agencies, authorities and other bodies, incorporated or unincorporated and whether having distinct legal personality or not;
- (f) references to any party hereto or any person include references to any successor or assignee of such party or other person;
- (g) reference to:

NOTE: cf. RRC 4, Sch. 2, §2(f).

- (i) a member of Lloyd's includes a former member of Lloyd's;
- (ii) a former member of Lloyd's includes a member who has died or, as the context may require, the estate or personal representatives of such a member; and
- (iii) a member of Lloyd's includes reference to any administrator, administrative receiver, committee, curator bonis, executor, liquidator, manager, personal representative, supervisor or trustee in bankruptcy, or any other person entitled or bound to administer the affairs of the member concerned;

- (h) reference to:

NOTE: cf. RRC 4, Sch. 2, §2(g).

- (i) a managing agent includes a substitute agent appointed to perform any of the functions of a managing agent; and

- (ii) a members' agent include a substitute agent appointed to carry out any of the functions of a members' agent; and
- (i) unless the context otherwise requires, words denoting the singular number shall include the plural and vice versa.

DECLARATION OF TRUST

- 2.1 The Trustee shall stand possessed of the Trust Property upon trust to hold or apply all or any of it in the manner and order of priority set out in paragraphs 2.2 to 2.17 below.

NOTE: none of the trusts set out at RRC 7, §§2.2 to 2.17 directly enriches any EquitasRe-reinsured SYA participant. RRC 7, §2.1 ordaining orders of priority does not affect the EquitasRe-assured's-at-Lloyd's recourse to the Lloyd's enterprise, to which extent RRC 7 is an irrelevance.

- 2.2 In the event of being notified by any Reinsured Name or the Substitute Agent that ERL has failed to discharge its obligation to the Reinsured Name and/or the Trustee to make any payment to an Insurance Creditor in accordance with the Reinsurance Contract, the Trustee shall take such steps as it shall in its absolute discretion deem appropriate to seek to enforce the obligation of ERL to make such payment or to seek to obtain damages from ERL for failure so to do provided that the Insurance Creditor and/or the Reinsured Name shall have provided the Trustee with such evidence as it may, acting in good faith, in its absolute discretion require as to the non performance by ERL of its obligation under the Reinsurance Contract and that the relevant Reinsured Name shall have taken such steps as the Trustee may reasonably require to seek to enforce performance by ERL of such obligation. The Trustee shall have power to determine, upon such advice as it, acting in good faith, in its absolute discretion thinks fit as to the merits of any such claim against ERL and having regard to all the circumstances, the most appropriate action (if any) which it should take against ERL to enforce such obligation. Any sums received by the Trustee in respect of such judgment shall, unless an Insolvency Event has occurred, be distributed in the following manner:

NOTE: this clause's operation is not expressly linked to whether or not a RRC 7, §2.15 Insolvency Event has occurred (*cf.* RRC 7, §§2.3 ("prior to the occurrence of an Insolvency Event"), 2.4 ("Upon the occurrence of an Insolvency Event")). In a RRC 7, §2.2 circumstance, Equitas Policyholders Trustee is required ("shall take ... steps") as the *ad hoc* debt collector for a particular complaining EquitasRe-reinsured SYA participant, or for the Substitute Agent, against Equitas Re.

notified by any Reinsured Name: in practice, no RRC 4 "Name" (*a fortiori* a RRC 4 "Closed Year Name") will know or be permitted by Equitas Re to know — either from Equitas Re or from the EquitasRe-assured-at-Lloyd's (assuming the latter can find the EquitasRe-reinsured SYA participant in the first place and has been erroneously advised to contact him) — whether a particular EquitasRe-assured-at-Lloyd's has or has not been paid. Nor will he know (since neither RRC 7 nor an instruction sheet appears to have been widely disseminated) of Equitas Policyholders Trustee or its RRC 7 role.

notified by ... the Substitute Agent: query if AUA 9 has a watching brief in relation to any particular EquitasRe-assured-at-Lloyd's. RRC 4 Sch. 4, §1.6 notwithstanding, no Lloyd's broker will ordinarily broke a claim to AUA 9; query what arrangements are in place between Equitas Re and AUA 9 whereby AUA 9 would ordinarily acquire such intelligence.

ERL has failed: presumably as a result of Equitas Ltd.'s default on a valid RRC 5, §§2.3 obligation to Equitas Re. Equitas Policyholders Trustee has no express RRC 7 function directly in relation to Equitas Ltd.

any payment ... in accordance with the Reinsurance Contract ... the obligation to make such payment: see especially RRC 4, §§3.2 and 3.4.

to an Insurance Creditor: the test is whether Equitas Re has defaulted on a RRC 4, §§3.2 and 3.4 payment to an EquitasRe-assured-at-Lloyd's, not: (1) whether Equitas Policyholders Trustee has taken a relevant RRC 4, §4 assignment. To the extent that Equitas Policyholders Trustee is an *ibid.*, §4.1 (2) whether the payment is in respect of Equitas Re's RRC 4, §3 reinsurance obligation (on which see for example *ibid.*, §§3.4, 9.4(c)) or its *ibid.*, §9 run-off agency obligations.

such steps as it shall in its absolute discretion deem appropriate: the discretion presumably relates only to the particular "steps", not to Equitas Policyholders Trustee's obligation to take some action.

damages: see RRC 4, §4.1(a)(i) (the relevant EquitasRe-reinsured SYA participant's right to receive damages for Equitas Re's breach of its RRC 4, §3 Reinsurance Obligation); *cf.* RRC 4, §10.2.

the Insurance Creditor and/or the Reinsured Name shall have provided the Trustee: the frustrated EquitasRe-assured-at-Lloyd's is likely to be aware (through his Lloyd's broker) that his agreed claim has not been paid by Equitas Re, but no EquitasRe-reinsured SYA participant will ordinarily know of (in effect) his own default. Query if either the EquitasRe-assured-at-Lloyd's or the EquitasRe-reinsured SYA participant will know, has been told, or will easily be able to discover that he has an RRC 7, §2.2 function or remedy in the first place: RRCs 4, 5 and 7 have not been widely disseminated, including to any EquitasRe-assured-at-Lloyd's (query to his Lloyd's broker), or to any EquitasRe-reinsured SYA participant, or have been placed in a central depository available for general inspection (and do not appear even to exist in one definitive version). More likely to know if an EquitasRe-assured-at-Lloyd's has not been paid are Equitas Re itself, Equitas Ltd. as the defaulting party, Equitas

Policyholders Trustee through such of its directors as it has in common with Equitas Re,¹⁸ and possibly AUA 9.¹⁹ The EquitasRe-assured-at-Lloyd's in his ignorance of RRC 7(or in any event) is more likely to seek recourse to relevant common-use funds at the Lloyd's enterprise.

that the relevant Reinsured Name shall have taken such steps as the Trustee may reasonably require to seek to enforce performance by ERL: contractually doubtful given RRC 4, §9.4, and illogical since the RRC 4 "Name" has already assigned his rights to Equitas Policyholders Trustee, and impracticable other than through AUA 9 (if the extricated EquitasRe-RTCd SYA participant chooses, which in practice he will not, to take any interest in the matter).

in its absolute discretion thinks fit as to the merits of any ... claim against ERL: query if Equitas Policyholders Trustee can exercise a claims adjudication function other than through Equitas Re. In any event, as part of the Equitas group it has a duty-interest conflict; and sharing directors with Equitas Re, query if it can exercise its discretion with sufficient detachment.

such judgment: "such" is error since "judgment" has not been previously used in the clause. Per RRC 7, §2.15(a), the mere obtaining of a judgment against Equitas Re does not of itself constitute an Insolvency Event.

unless an Insolvency Event has occurred: making it clear that the preceding RRC 7, §2.2 text operates whether or not an Insolvency Event has occurred.

- (a) subject to paragraph (b) below, upon receiving such evidence as it may in its absolute discretion deem appropriate as to the identity of the Insurance Creditor to be paid such sums under the terms of the Reinsurance Contract, the Trustee shall pay such sums to the relevant Insurance Creditor. As a precondition to making such payment, the Trustee may require written confirmation from such Insurance Creditor that such sums will be applied to reduce or extinguish pro tanto the amounts owed to him under the policy of insurance or reinsurance which has been reinsured by ERL under the terms of the Reinsurance Contract and/or any judgment he has obtained in respect of such contract;

NOTE: and see RRC 7, §2.9.

the Trustee shall pay such sums to the relevant Insurance Creditor: this mechanism, in which Equitas Policyholders Trustee acts as a EquitasRe-reinsured SYA participant's ad hoc debt collector, is other than following an Insolvency Event, the procedure for payment in the event of which are the subject of later clauses.

written confirmation from such Insurance Creditor: see similarly at RRC 7, §2.11.

- (b) if the Insurance Creditor referred to in paragraph (a) above has already received payment in whole or in part of the sums due to him under the policy of insurance or reinsurance which has been insured under the terms of the Reinsurance Contract (including by reason of the exercise of any rights of set-off which such Insurance Creditor may have), the Trustee shall only make payment to such Insurance Creditor up to the balance of the amounts owing to such Insurance Creditor under the relevant policies of insurance or reinsurance as determined by the Trustee upon receipt of such evidence as it, acting in good faith, in its absolute discretion determines necessary to be able to determine such amounts. Any balance shall be paid by the Trustee to the Substitute Agent for distribution pro rata to their respective contributions to those persons who have contributed to such payments made to the relevant Insurance Creditor, including any contribution by way of set-off. In determining whether such Insurance Creditor has already received payment in respect of the relevant policy of insurance or reinsurance as described above, the Trustee is entitled to assume without enquiry that no such payment has been received by such Insurance Creditor, in the absence of receiving such evidence from the Reinsured Name or Substitute Agent as it may in its absolute discretion require, establishing that such payment has been made.

which has been insured: error: the only relevant RRC 4 transactions are EquitasRe-reinsurance and EquitasRe-RTC.

In determining whether such Insurance Creditor has already received payment in respect of the relevant policy of insurance or reinsurance....: see the similar provision at RRC 7, §2.9.

receiving such evidence from the Reinsured Name or Substitute Agent: presumably wholly impractical.

- 2.3 If prior to the occurrence of an Insolvency Event the Trustee receives any sums in respect of the Trust Property other than in the circumstances described in clause 2.2 above it shall either distribute such sums to the Insurance Creditors and/or the Substitute Agent for distribution to the relevant Reinsured Name (in the case of a Syndicate or Closed Year Syndicate to the Names on that Syndicate or Close Year Syndicate pro rata to their interests in that Syndicate or Closed Year Syndicate)

¹⁸ See p.42.

¹⁹ See p.A30.

in the manner described in paragraphs (a) and (b) of clause 2.2 or, to the extent that the sums received represent sums that should have been paid to an Insurance Creditor by ERL in accordance with clause 3.4 of the Reinsurance Contract, the Trustee may alternatively return such sums to ERL and require ERL to distribute such sums in accordance with the terms of the Reinsurance Contract.

NOTE: Equitas Policyholders Trustee has no RRC 7, §2.3 functions in relation to Equitas Ltd.: “Insolvency Event” as defined addresses the insolvency only of Equitas Re, not Equitas Ltd.

receives: there appears to be no RRC 7 provision under which Equitas Policyholders Trustee ordinarily would receive any such money. *Cf.* RRC 7, §2.4.

the Insurance Creditors: error for “Insurance Creditors”: RRC 7, §2.3 does not specify any particular Insurance Creditors.

sums that should have been paid to an Insurance Creditor by ERL in accordance with clause 3.4 of the Reinsurance Contract: this does not address what Equitas Policyholders Trustee is required to do with amounts appropriated by it through a RRC 4, §4.10 notice served by it under RRC 7, §2.4, which empowered Equitas Policyholders Trustee to serve such a notice only “[u]pon the occurrence of an Insolvency Event”, not before.

return: on Equitas Policyholders Trustee’s indemnification by Equitas Re, see RRC 7, §§2.14, 7.3(b).

- 2.4 Upon the occurrence of an Insolvency Event, the Trustee may serve a notice pursuant to clause 4.10 of the Reinsurance Contract requiring payments which would otherwise be paid to Insurance Creditors by ERL under the terms of the Reinsurance Contract to be paid to it and shall take such steps against ERL as it shall deem necessary to realise and protect the Trust Property, including, without limitation, petitioning for the winding-up of ERL or consenting or objecting to any scheme or composition proposed to be entered into between ERL and its creditors. Unless and until the Trustee receives notice in writing from any Insurance Creditor or ERL that an Insolvency Event has occurred, together with such supporting evidence of the occurrence of such Insolvency Event as the Trustee may acting in good faith in its absolute discretion require, the Trustee is entitled to assume (and it is hereby declared to be the intention of the Trustee that it will assume) without enquiry that no Insolvency Event has occurred.

NOTE: Equitas Policyholders Trustee has no RRC 7, §2.4 functions in relation to Equitas Ltd. RRC 7, §2.4 operates only upon the occurrence of an Insolvency Event.

Upon: *cf.* RRC 4, §4.10 “Following”.

occurrence of an Insolvent Event: to be read with RRC 7, §2.4’s last sentence and *ibid.*, §2.15. Absent a RRC 7, §2.15 Insolvency Event, *ibid.* §2.4 does not operate at all.

may serve: RRC 4, §3.4 describes the power as an “election”. *Ibid.*, §4.10 confers absolute discretion (and see similarly RRC 7, §5(c)). Service of such a notice is also conditional on Equitas Policyholders Trustee being satisfactorily indemnified under *ibid.*, §2.14. In refraining from exercising that power, Equitas Policyholders Trustee does not waive relevant rights: *ibid.*, §13.

a notice pursuant to clause 4.10 of the Reinsurance Contract: this should be read with RRC 4, §§3.4 and 4.5. Equitas Policyholders Trustee’s RRC 7, §2.4 power to serve a RRC 4, §4.10 notice is confined a notice on Equitas Re, not Equitas Ltd. Equitas Re assets capable of being captured by such a notice are confined to those covered by RRC 4, §3.4(d) and (e), *viz.*, Equitas Re’s personal, beneficially owned assets, not those subject to the instruments mentioned at *ibid.*, §3.4(a)–(c). The notice covers only specific payments which would otherwise have been made to specific Insurance Creditors (see below), and only “upon the occurrence of an Insolvency Event” (*cf.* RRC 7, §2.5 “Following the occurrence of an Insolvency Event”).

payments which would otherwise be paid to Insurance Creditors by ERL under the terms of the Reinsurance Contract: the extent to which Equitas Policyholders Trustee is able solely by a RRC 4, §4.10 notice to liberate cash from Equitas Re is narrowly confined to such particular payments (if any) as Equitas Re may already have overtly decided to pay (in the particular way specified in *ibid.*, §3.4(d) or (e)) to a particular EquitasRe-assured-at-Lloyd’s in relation to a particular relevant claim. Equitas Policyholders Trustee has no right under this clause or further to an *ibid.*, §4.10 notice to require insolvent Equitas Re to pay over to it all or any of its other assets, and in no event any of the assets held in relevant claims securitisation trust funds.²⁰ As to the particular claims monies covered, see *ibid.*, §3.4(d) (certain MO and employer’s liability) and *ibid.*, §3.4(e) (other claims monies not covered by *ibid.*, §3.4(a)–(d)). Such payment counts as Equitas Re’s discharge of the relevant liability: *ibid.*, §4.10.

to Insurance Creditors: infelicitous: the subject of a RRC 4, §4.10 notice is money that Equitas Re has decided to pay to a specific Insurance Creditor, not to Insurance Creditors generally.

to be paid to it: presumably what Equitas Policyholders Trustee then does with the money is determined (absent any more specific provision) by RRC 7, §2.5.

shall: *cf.* Equitas Policyholders Trustee’s RRC 7, §2.4 mere power to serve a RRC 4, §4.10 notice. Equitas Policyholders Trustee thus has a compulsory role in marshalling and distributing Trust Property following any Insolvency Event. The obligation covers only RRC 4, §4.1 “Assigned Property”, not the generality of Equitas Re’s assets.²¹ Discharging the obligation may involve com-

²⁰ See RRC 4, §4.2.

²¹ See the description at *S&M*, §50 (p.17):-

plex calculations as to the entitlement against Equitas Re of each individual EquitasRe-reinsured SYA participant: see RRC 7, §2.6 *et seq.*

take such steps ... as it shall deem necessary to realise and protect: though Equitas Policyholders Trustee taking such steps etc. is separate from it serving a RRC 4, §4.10 notice, RRC 7, §2.4 “realised” assets and RRC 4, §4.10-obtained assets: are both distributed in accordance with RRC 7, §2.5. Presumably Equitas Re has no substantial assets of its own, having paid over²² or assigned²³ them all to Equitas Ltd. as RRC 5, §3 consideration. *Cf.* Equitas Re money acquired by Equitas Policyholders Trustee under RRC 7, §§2.2 or 2.3.

the Trust Property: Equitas Policyholders Trustee appears to be entitled only to such Trust Property as represents Equitas Re’s adjusted liability to its “creditors”: see RRC 7, §2.10 (“payable”). Subject to that, RRC 7, §2.4 requires Equitas Policyholders Trustee to realise all Trust Property

against ERL: presumably Equitas Ltd. is the appropriate party, not Equitas Re.

petitioning for the winding-up of ERL: as assignee of every EquitasRe-reinsured SYA participant’s rights against Equitas Re, Equitas Policyholders Trustee is a creditor of Equitas Re. *Cf.* RRC 4, Sch. 3, §2.3(a) (resolution to wind up) and *ibid.*, §2.3(b) (order to wind up).

consenting or objecting to any scheme or composition proposed to be entered into between ERL and its creditors: arguably Equitas Policyholders Trustee as RRC 4, §4 assignee has one vote.

that it will assume: *cf.* the similar provision at RRC 7, §6.1. Equitas Policyholders Trustee is not entitled to so assume if it knows otherwise.

- 2.5 Following the occurrence of an Insolvency Event, any sums received by the Trustee in respect of the Trust Property including, without limitation, on a winding-up of ERL or pursuant to any scheme or composition entered into between ERL and its creditors including any scheme of arrangement or compromise made under section 425 of the Companies Act 1985 and any voluntary arrangements made between ERL and its creditors under sections 1 to 8 of the Insolvency Act shall be distributed by the Trustee to the Insurance Creditors in accordance with clause 2.7.

NOTE: a RRC 4, Sch. 3, §2.3 Automatic Reinsurance Trigger Event does not involve Equitas Re itself adjusting its liabilities, that adjustment taking effect, and then Equitas Re itself paying out in its own liquidation. Rather, the RRC 4, Sch. 3, §2.3(a)-(b)-indicated liquidation takes effect; Equitas Policyholders Trustee proves in the liquidation under RRC 7, §2.4 and see *ibid.*, §2.6; the liquidator distributes to Equitas Policyholders Trustee; and the latter then distributes to RRC 7 Insurance Creditors under *ibid.*, §2.7. Equitas Policyholders Trustee has no RRC 7, §2.5 functions in relation to Equitas Ltd.

Following the occurrence of an Insolvency Event: to be read (to the extent necessary) with the last sentence of RRC 7, §2.4?

any sums received by the Trustee in respect of the Trust Property: apparently includes sums appropriated by Equitas Policyholders Trustee by a RRC 4, §4.10 notice served under RRC 7, §2.4. “[A]ny” presumably also includes sums not specifically designated by Equitas Re to pay Insurance Creditors.

Insolvency Act: error for “Insolvency Act 1986”.

shall be distributed by the Trustee ... in accordance with clause 2.7: *viz.*, and not under RRC 4, §3.4 by Equitas Re.

the Insurance Creditors: error for “Insurance Creditors”: no specific Insurance Creditors are meant.

- 2.6 In proving in a winding-up of ERL or in making a claim pursuant to a scheme or composition entered into between ERL and its creditors, the Trustee shall from the information available to it seek to establish the amount owing by ERL under the terms of the Reinsurance Contract and the amount of the Secured Obligations that is due to each Insurance Creditor. In doing so, the Trustee shall be entitled to consider all information provided to it by the Insurance Creditors or any broker or by ERL or any other information as it, in its absolute discretion, deems relevant. In the absence of obtaining sufficient evidence from each Insurance Creditor satisfactory to the Trustee to enable it to determine the amount that is due to such creditor in respect of the Secured Obligations, it shall be entitled to assume that any figures provided by a liquidator, administrator or supervisor or as determined pursuant to any scheme of arrangement pursuant to section 425 of the Companies Act 1985, which enables it to calculate directly or indirectly the amount so owing to such Insurance Creditor, are correct without further enquiry.

NOTE: Equitas Policyholders Trustee has no RRC 7, §2.6 functions in relation to Equitas Ltd.

proving in a winding-up of ERL: this is the only provision in RRCs 4, 5, 7 or 17 which expressly addresses the proving process.

In the context of Equitas, Names are the policyholders, so that the risk they run, if Equitas fails, is that they will be liable to pay immediately claims received from their own policyholders, while the wherewithall to do so (if not already used up) remains trapped indefinitely in Equitas. However, in our view, it is unlikely (though not impossible) that this would happen

Ibid. proceeds to give reasons.

²² See RRC 5, §3.1

²³ See RRC 5, §3.2.

from the information available to it: Equitas Policyholders Trustee's information will include (for example) information it obtains from its sibling Equitas Re; information submitted to it (presumably without prejudice to his rights against EquitasRe-reinsured SYA participants) by each responsive Insurance Creditor; information from the Lloyd's enterprise, and any other sources (presumably Equitas Policyholders Trustee will make the usual public solicitations).

the amount of the Secured Obligations: under RRC 7, §2.4, Equitas Policyholders Trustee will have attempted to obtain all Trust Property, not just the amount of the Secured Obligations.

that is due to each Insurance Creditor: the provision is directed to each individual known Insurance Creditor, not to Insurance Creditors generally.

without further enquiry: but this is not necessarily the end of the matter: see RRC 7, §2.

- 2.7 All moneys received or recovered by the Trustee in respect of the Secured Obligations following an Insolvency Event shall be held by it on trust to be applied as follows in the following order of priority (and in each case only if and to the extent that payments or provisions of a higher priority have been made in full):

NOTE: Equitas Policyholders Trustee receives money following an "Insolvency Event" further to RRC 4, §2.4.

to be applied as follows: RRC 7, §2.8 purports to exonerate Equitas Policyholders Trustee for any good-faith distribution.

in full: each successive lower order receives only if there is a surplus from paying each higher order in full. The EquitasRe-assured-at-Lloyd's is not first: see RRC 7, §2.7(b).

- (a) first, in or towards satisfaction of the fees or other remuneration payable to the Trustee and any costs, charges, liabilities and expenses incurred by the Trustee under or in connection with this Declaration of Trust;

NOTE: to be read with RRC 7, §2.14; and see *ibid.*, §7.3 (indemnification by Equitas Re generally). Cf. Equitas Re's²⁴ and Equitas Ltd.'s²⁵ respective obligation to pay General Creditors in full. Equitas Policyholders Trustee's creditors are RRC 5, Sch. 1, §1-defined "General Creditors".

fees or other remuneration payable to the Trustee:

costs, charges, liabilities and expenses incurred by the Trustee: Equitas Policyholders Trustee is likely to buy extensive and accounting advice.

- (b) second, in or towards satisfaction of the Secured Obligations owing to each Insurance Creditor (or any person to whom an Insurance Creditor has assigned all or any part of the Secured Obligations) rateably in proportion to the Secured Obligations, as determined by the Trustee in establishing a proof or claim in a liquidation of ERL or in any composition or scheme made between it and its creditors (or if no proof or claim has been made, in accordance with the Trustee's determination of the Secured Obligations owing (whether actually, prospectively or contingently) to each Insurance Creditor (or an assignee as aforesaid);

NOTE: cf. RRC 4, §3.7, and RRC 5, §2.6, which expressly exclude the EquitasRe-assured-at-Lloyd's as a third-party beneficiary. Notwithstanding RRC 7, §2.7(b) — query when if ever he will be paid by Equitas Policyholders Trustee, and to what extent — there is no reason why the EquitasRe-assured-at-Lloyd's cannot proceed to full recourse against relevant components of the Lloyd's enterprise in the ordinary way. Equitas Policyholders Trustee is permitted to refrain from any RRC 7, §2 performance unless satisfied of its own indemnification: see *ibid.*, §2.14. It is permitted to refrain from making any payment to any EquitasRe-assured-at-Lloyd's unless the latter confirms in writing that he will apply the payment in the manner envisaged in RRC 7, §2.11: *ibid.* To the extent it does make a good-faith payment, Equitas Policyholders Trustee is supposedly protected from each Insurance Creditor (who is not bound by any of RRC 7's provisions in the first place): see *ibid.*, §2.8. Equitas Policyholders Trustee is entitled to assume that (apparently) every Insurance Creditor has not been paid absent contrary evidence from an EquitasRe-reinsured SYA participant or AUA 9: see *ibid.*, §2.9. It is permitted to withhold distribution if unable to determine how relevant sums should be distributed or aware of any dispute or proceedings by any person in respect of his entitlement: see *ibid.*, §2.16. Concerning the amount payable under this subclause in the event of Equitas Re adopting proportionate cover, see *ibid.*, §2.10.

in or towards satisfaction of: the EquitasRe-assured-at-Lloyd's appears to be under no obligation to settle with Equitas Policyholders Trustee: his recourse is against relevant components of the Lloyd's enterprise in the ordinary way (see generally Chapter 3). Absent appropriate express contrary agreement, arguably a RRC 7, §2.7(b) payment to an EquitasRe-assured-at-Lloyd's is *ex gratia*.

Secured Obligations: infelicitous and misleading: "Secured Obligations" appears to be merely synonymous with, and does not appear to add anything to, Equitas Re's RRC 4, §3 "Reinsurance Obligation". Presumably all such obligations are to be discharged before Equitas Policyholders Trustee makes any RRC 7, §2.7(c) or (d) payment. Equitas Policyholders Trustee is not entitled to make residual payment to a part-paid EquitasRe-assured-at-Lloyd's and then refund the EquitasRe-reinsured SYA participant under RRC 7, §2.7(c), and then pay other EquitasRe-assureds-at-Lloyd's, and so on.

²⁴ See RRC 4, Sch. 3, §12.

²⁵ See RRC 5, Sch. 3, §12.

as determined by the Trustee: RRC 7, §2.16 governs if Equitas Policyholders Trustee is unable to determine how relevant money should be distributed.

- (c) third, to each Reinsured Name who had, prior to any payment by the Trustee under paragraph (b) above, made any payment to an Insurance Creditor (or any person to whom such Insurance Creditor had assigned the whole or any part of the Secured Obligations) including any payment made by way of set-off in respect of the Secured Obligations, to the extent of such payment, or, if there are insufficient moneys to make such payment in full, rateably in accordance with the amounts of such payments; and

NOTE: see RRC 7, §2.9. Netting off was envisaged in *SOD*.²⁶ Concerning the amount payable under this subclause in the event of Equitas Re adopting proportionate cover, see *ibid.*, §2.10.

- (d) fourth, to each Reinsured Name pro rata to the value of the Trust Property assigned by each Reinsured Name (the value to be defined by reference to the amount the Trustee established in respect of the Trust Property assigned by each Reinsured Name in making a proof or claim in a liquidation of ERL or in any composition or scheme made between it and its creditors (or if no proof or claim has been made, in accordance with the Trustee's determination of the amount received by it in respect of the Trust Property assigned by such Reinsured Name)).

NOTE: this provision provides that all of the remaining Trust Property not used to pay expenses, and then to pay Insurance Creditors, and then to reimburse relevant EquitasRe-reinsured SYA participants, is to be distributed to all EquitasRe-reinsured SYA participants. Cf. RRC 4, §13.2(c) (distribution to the EquitasRe-reinsured SYA participant in the event of Equitas Re receiving "compensation" from Equitas Ltd.)

pro rata to the value of the Trust Property assigned: viz., in proportion to whatever Trust Property each particular EquitasRe-reinsured SYA participant assigned to Equitas Re under RRC 4, §4.1 bears to the entirety of such Equitas Re assets as remain in Equitas Policyholders Trustee's control under RRC 7, §2.5; presumably a feat of database organisation (and perhaps calculation). Query whether the calculation takes into account the amount of Trust Property already distributed by a solvent Equitas Re to discharge the particular EquitasRe-reinsured SYA participant's EquitasRe-reinsured liabilities.

the value to be defined: error for "the value to be determined".

- 2.8 Provided the Trustee distributes any proceeds referred to in clause 2.7 to Insurance Creditors (or an assignee thereof in accordance with clause 2.7) or Reinsured Names as set out therein, in the absence of the wilful default of the Trustee in establishing the amount of the Secured Obligations owing to each Insurance Creditor (or an assignee thereof) or the value of the Trust Property assigned by each Reinsured Name in accordance with clause 2.7, no Insurance Creditor, Reinsured Name nor the Substitute Agent shall be entitled to make any claim against the Trustee in respect of the distribution of such proceeds by the Trustee.

Reinsured Name nor the Substitute Agent: respectively bound by RRC 4, §4.6.

- 2.9 In determining whether an Insurance Creditor has received payment from any Reinsured Name in respect of a policy of insurance or reinsurance as set out in clause 2.7(c), the Trustee is entitled to assume without enquiry that no such payment has been received by such Insurance Creditor, in the absence of receiving such evidence from the Reinsured Name or Substitute Agent as it may, acting in good faith, in its absolute discretion require establishing that such payment has been made.

NOTE: it is impossible in practice that any EquitasRe-reinsured SYA participant would pay any EquitasRe-assured-at-Lloyd's direct.

an Insurance Creditor: viz., every Insurance Creditor? Presumably Equitas Re will have extensive relevant records.

- 2.10 If the amount payable to the Trustee in respect of any winding-up or scheme or composition entered into between ERL and its creditors is adjusted as a result of the introduction of any Proportionate Cover Plan or due to the adjustment of the value attributed to any future or contingent liability or claim, in accordance with the terms of such winding-up or scheme or composition, the amount payable to the Insurance Creditors and Reinsured Names pursuant to clause 2.7 shall be varied in accordance with such adjustment provided that such adjustment shall not affect any amounts previously paid to any Insurance Creditor or Reinsured Name by the Trustee. If the Trustee is of the view

²⁶ *SOD*, p.112:-

A proportionate cover plan would enable Equitas to continue paying a proportion of policyholder claims if it were ever confronted with a shortfall of assets and would enable Equitas to avoid the cessation of claims payment which would otherwise follow if Equitas were forced into insolvency. This procedure will also benefit Names, in that they would avoid the obligation of having to pay the full amount of their liabilities if Equitas were forced to cease paying claims.

(considering such information as it in its absolute discretion deems necessary) that such adjustment of the amount payable in such winding-up or scheme or composition impacts upon the Trustees' previous determination of the Secured Obligations owing to each Insurance Creditor, the Trustee shall adjust the future amounts payable to each Insurance Creditor under this Declaration of Trust in accordance with the amount of the Secured Obligations it determines is owing to each Insurance Creditor following such adjustment. In determining such adjustment, the Trustee shall be entitled to assume that any figures prepared by a liquidator, administrator or supervisor which enable it to calculate directly or indirectly the adjusted amount owing to such Insurance Creditor are correct.

NOTE: this should be read with RRC 4, Sch. 3, §10.1.

If ... as a result of the introduction of any Proportionate Cover Plan: "[i]f" is infelicitous: adjustment is generally²⁷ intrinsic²⁸ to any Proportionate Cover Plan.

payable to the Trustee: viz., payable under RRC 7, §2.4.

its creditors: viz., relevant EquitasRe-reinsured SYA participants.

, in accordance with the terms of such winding-up or scheme or composition: the comma infelicitously suggests a proportionate cover plan in accordance with the terms of a liquidation, scheme or composition, rather than, as will be the case,²⁹ a plan adopted before such insolvency process.

- 2.11 The Trustee may refrain from distributing any amounts received in respect of a proof or claim in accordance with clause 2.7 to any Insurance Creditor until receipt of a written confirmation from such Insurance Creditor that such sums will be applied to reduce or extinguish pro tanto the amounts owed to him under the policy of insurance or reinsurance which has been reinsured by ERL under the terms of the Reinsurance Contract.

written confirmation from such Insurance Creditor: see similarly at RRC 7, §2.2(a).

under the policy of insurance or reinsurance: query if this means applied solely to a particular designated policy or proportionately between a number of such policies held by the EquitasRe-assured-at-Lloyd's.

- 2.12 The Trustee shall not be required to take any steps to enforce the Secured Obligations other than provided pursuant to clauses 2.1 to 2.11 above.
- 2.13 Upon the receipt of such evidence as the Trustee may in its absolute discretion require that the Secured Obligations have been paid and discharged in full and that all sums which are or may become payable to it pursuant to the Declaration of Trust have been satisfied in full, the Trustee will release the security constituted by the Reinsurance Contract and this Declaration of Trust and reassign to each Reinsured Name or such other person as each Reinsured Name may direct or such other person as may be entitled thereto, all of the Trust Property.

NOTE: see RRC 4, §4.4.

that the Secured Obligations have been paid and discharged in full: in the event of a relevant insolvency process, the Secured Obligations are unlikely to be discharged in full, forestalling release of Equitas Re's assets to any EquitasRe-reinsured SYA participant.

- 2.14 The Trustee shall not be required to take any action under this clause 2 or any other provision of this Declaration of Trust, unless it is satisfied that it will be indemnified in respect of all costs, charges, expenses and liabilities to be properly incurred by it in respect of such action. To the extent that the Trustee is not able to recover any such costs, charges, expenses or liabilities from Equitas under clause 7 of this Declaration of Trust the Trustee is entitled, without prejudice to its right to indemnify itself from the Trust Property as a matter of law, to utilise the proceeds of any sums received in respect of the Trust Property in meeting such costs, charges, expenses or liabilities and to deduct such amounts from the amount payable by it to Insurance Creditors and to the Substitute Agent or Names under the terms of this Declaration of Trust.

NOTE: see RRC 7, §2.7(a) to the extent of relevant expenses etc. On indemnification generally, see *ibid.*, §7. Concerning its functions in an Insolvency Event, Equitas Policyholders Trustee is already empowered to hold moneys received or recovered by it on trust to pay its own fees and outgoings: see RRC 7, §2.7(a). This clause §2.14 applies to Equitas Policyholders Trustee's functions generally under RRC 7, §2, including proxy debt collecting under *ibid.*, §2.2.

- 2.15 For the purpose of this Declaration of Trust, the following shall constitute an Insolvency Event:

²⁷ But see for example RRC 4, Sch. 3, §8.2.

²⁸ See RRC 4, Sch. 3, §3.1.

²⁹ See RRC 4, Sch. 3, §3.1.

NOTE: the clause deals with the insolvency only of Equitas Re, not Equitas Ltd.

- (a) ERL shall fail to comply with any obligation to make any payment under the terms of the Reinsurance Contract and, final judgment not being subject to further appeal having been obtained in the court of any relevant jurisdiction against ERL in respect of such breach, ERL shall fail to satisfy the terms of such judgment within 7 days;

NOTE: failure to satisfy a relevant judgment in full is a frequent basis for intervention³⁰ or recourse.³¹

any: presumably Equitas Re would not allow matters to deteriorate to the point of precipitating an “Insolvency Event” and thus exposing its RRC 4, §4.1 Assigned Property to seizure by Equitas Policyholders Trustee under RRC 7, §2.4.

Judgment ... against ERL: viz., against Equitas Re personally under RRC 4, §3, obtained (presumably necessarily rarely: see for example RRC 4, §9.4(c)) by an EquitasRe-reinsured SYA participant rather than by an EquitasRe-assured-at-Lloyd’s — the latter would presumably be challenged (and may find it highly self-prejudicial) to argue that he, rather than Equitas Policyholders Trustee, was a direct beneficiary of RRC 4, §3, and Equitas Re presently insistently resists the notion that it is personally contractually liable directly to any EquitasRe-assured-at-Lloyd’s. Cf. a judgment against a relevant EquitasRe-reinsured SYA participant.³²

and: under this sub-clause, the Insolvency Event occurs not on the mere obtaining of a judgment but when Equitas Re fails to pay it within seven days.

- (b) any order shall be made by any competent court or resolution passed for the winding-up of ERL or a liquidator or provisional liquidator is appointed in respect of ERL;

NOTE: these are Automatic Reinsurance Trigger Events under RRC 4, Sch. 3, §2.3(a) and (b), which lead to *ibid.*, Sch. 3, §3.1 compulsory adjusting.

- (c) ERL is unable or deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or becomes unable to pay its debts as they fall due or suspends or threatens to suspend making payments (whether of principal or interest) with respect to all or any class of its debts. Provided that in determining whether ERL is unable to pay its debts as aforesaid, account shall be taken of the extent to which any debt which ERL would otherwise be obliged to pay in full can be paid at less than that amount under:

NOTE: RRC 7, §2.15(c) recognises that RRC 4, Sch. 3 is a process which operates to avoid otherwise inevitable insolvency as ordinarily and statutorily understood. Equitas Re invokes proportionate cover is not *per se* a RRC 7, §2.15 Insolvency Event. See similarly EATD, §12(a)(2).

account shall be taken: query whether the provision is binding on a court of competent jurisdiction: the Proportionate Cover Plan referred to at RRC 7, §2.15(c)(ii) and (ii) merely masks, rather than cures, actual insolvency; and query the protective value of merely having the facility without using it (see *ibid.*, §2.15(c)(ii)).

can be paid: presumably “can actually be paid”, not merely “can in theory be paid”: the feasibility of a proportionate cover plan would presumably need to be considered before Equitas Re can seek protection from Equitas Policyholders Trustee’s exercise of its RRC 7, §2.4 marshalling obligation.

- (i) any Proportionate Cover Plan then in effect; or

NOTE: on Proportionate Cover Plans, see RRC 4, Sch. 3.

- (ii) any Proportionate Cover Plan which ERL has power to introduce unless ERL has stated that no Proportionate Cover Plan will be introduced to enable it to pay its debts; or

any Proportionate Cover Plan which ERL has power to introduce unless ERL has stated that no Proportionate Cover Plan will be introduced: thus Equitas Re is protected from a RRC 7, §2.15 Insolvency Event merely by retaining the option to implement a Proportionate Cover Plan.

enable it to pay its debts: viz., enable it to contractually reduce the quantum of its relevant debts so as to pay them at less than 100%.

- (iii) any suspension of payments introduced pursuant to paragraph 9 of schedule 3 to the Reinsurance Contract; and

NOTE: if Equitas Re simply stops paying all claims under RRC 4, Sch. 3, §9 — no RRC 4, Sch. 3, §2.1(a)-(c) “Certified Reinsurance Trigger Event” being independently a RRC 7, §2.15 “Insolvency Event” — then it manages to escape a RRC 7, §2.15(c) “Insolvency Event”.

³⁰ See for example EATD, §12(a)(4)(b) (*ibid.*, §12(c) seizure of the EATF by the NYID).

³¹ See for example LATD, §5.2 (claim becomes enforceable against LATD); Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.3 (claim becomes enforceable against that trust fund); Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §2.3 (claim becomes enforceable against that trust fund).

³² Dealt with at (for example) EATD, §12(a)(4)(a); LATD, §5.2; Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.3; Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §2.3.

any: presumably any suspension continually complying with RRC 4, Sch. 3, §9, especially *ibid.*, “for the minimum period reasonably necessary”.

and: presumably “or” is meant.

- (d) an administrator, administrative receiver or manager, receiver, trustee or similar officer is appointed or an administration order made with respect to ERL or the whole or any substantial part of its assets.

administrative receiver or manager: this insolvency process is not referred to in either RRC 4 or 5. See generally Insolvency Act 1986, Part III, Chapter I (ss. 28-49), especially *ibid.*, s.42 *et seq.* “Administrative receiver” is defined.³³ The appointment of an administrative receiver or manager typically takes effect on the company’s breach of a relevant provision in a securitisation instrument.³⁴

receiver: see generally Insolvency Act 1986, Part III, Chapter I (ss. 28-49), especially *ibid.*, s.33 *et seq.*

- 2.16 Notwithstanding any other provision of this Declaration of Trust, if the Trustee receives any sums in respect of the Trust Property in respect of which it is unable to determine how such sums should be distributed in accordance with the terms of this Declaration of Trust or if it is aware of any dispute or proceedings by any person in respect of his entitlement under this Declaration of Trust or in respect of the Trustee’s determination of such entitlement, it shall be entitled to withhold distribution of such sums until it has been possible to establish to its satisfaction how they should be distributed, and the Trustee shall be entitled to take such advice pursuant to clause 5(a) as it thinks necessary to assist it in making such determination. Any determination of the persons entitled to any sums received by the Trustee in respect of the Trust Property shall be conclusive and, in the absence of wilful default on the part of the Trustee in making such determination, no Insurance Creditor, or Reinsured Name nor the Substitute Agent shall be entitled to make any claim against the Trustee under this Declaration of Trust in respect of the distribution of such proceeds by the Trustee. Pending such determination, the Trustee shall be entitled to invest such sums in Authorised Investments and to accumulate any income arising thereon.

NOTE: cf. RRC 7, §2.7(b), which appears to entitle Equitas Policyholders Trustee a sole discretion.

- 2.17 Notwithstanding any provision hereof, the Trustee shall not seek to prevent the implementation of any scheme or composition proposed to be entered into between ERL and its creditors in respect of any return of premium payable under clause 8 of the Reinsurance Contract unless the Trustee, acting in good faith, is of the opinion that following the implementation of such scheme or composition ERL would be unable or deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986, and, for these purposes, on the assumption that ERL has no power to introduce a Proportionate Cover Plan.

return of premium payable under clause 8 of the Reinsurance Contract: and see RRC 4, Sch. 5.

THE SECURITY

3.1

- (a) The security created by the Reinsurance Contract and the Declaration of Trust shall not be satisfied by any intermediate payment or satisfaction of any amount hereby or thereby secured and the security so created shall be in addition to and shall not be prejudiced by any other security or guarantee now or hereafter held by the Trustee or any other person for all or any part of the Secured Obligations hereby and thereby secured or the liability of any person for the whole or any part of the Secured Obligations;

The security: viz., the claims securitisation that RRC 7 purports to provide for EquitasRe-assureds-at-Lloyd’s as a class (rather than for particular individual EquitasRe-assureds-at-Lloyd’s). The contrivance of claims securitisation (of whatever value, and *a fortiori* if of questionable value) outside the Lloyd’s enterprise is probably irrelevant to the EquitasRe-assured’s-at-Lloyd’s right to 100% recourse to relevant components and funds of the Lloyd’s enterprise: need for full claims securitisation at Lloyd’s.

³³ Insolvency Act 1986, s.29(2):-

In this Chapter “administrative receiver” means — (a) a receiver or manager of the whole (or substantially the whole) of a company’s property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities; or (b) a person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company’s property.

³⁴ See for example Insolvency Act 1986, ss.29(2)(a), 37(1).

- (b) Every power and remedy give to the Trustee herein shall be in addition to and not a limitation of any other power or remedy vested in the Trustee under the Reinsurance Contract, or by statute, rule of law or otherwise, and all such powers may be exercised from time to time and as often as the Trustee deems expedient.
- 3.2 The trusts constituted by the Reinsurance Contract and this Declaration of Trust shall (subject to sub-clause 3.3) remain in full force and effect for so long as any amounts remain due to the Trustee or delegate of the Trustee pursuant to the Reinsurance Contract and this Declaration of Trust and any of the Secured Obligations remain due to any of the Insurance Creditors.
- 3.3 The perpetuity period applicable hereto under the rule against perpetuities shall be the period of eighty years less one day from the date of these presents and every power, authority or discretion to which the said rule applies which is conferred upon the Trustee or any other person by these presents shall only be exercisable during that period.

SUSPENSE ACCOUNT, INVESTMENT AND ACCUMULATIONS

- 4.1 Pending appropriation and distribution in accordance with clause 2 of any sums received by the Trustee in respect of the Trust Property, the Trustee may place such sums on a suspense account which it may maintain for as long as it thinks fit.

NOTE: ordinarily — viz., if circumstances envisaged in RRC 7, §2.2-2.5 do not arise — Equitas Policyholders Trustee will have no RRC 4-derived assets to invest. RRC 7 contains no provisions mandating a minimum level of RRC 7 funds or permitting RRC 7 assets to be seized by any person: cf. for example EATD, 12(c); LATD, 18(3); Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.4; Lloyd's US Credit-for-Reinsurance Trust Deed, §4.4.

- 4.2 The Trustee may invest in the name or under the control of the Trustee an amount equal to the balance from time to time standing to the credit of any suspense account in any Authorised Investment or by placing the same on deposit in the name or under the control of the Trustee and in such currency as the Trustee may think fit. The Trustee may at any time vary or transfer any of such investments for or into any other such Authorised Investment or convert any other moneys so deposited into any other currency and shall not be responsible for any loss occasioned thereby (whether by depreciation in value, fluctuation in exchange rates or otherwise) unless such loss is occasioned by the wilful misconduct or fraud of the Trustee. The Trustee shall not be under any obligation to diversify any investment or investments made by it pursuant to this sub-clause.
- 4.3 The resulting income arising on any investments made pursuant to clause 4.2 above may, at the discretion of the Trustee, be accumulated.

TRUSTEE'S RIGHTS, DUTIES AND SUPPLEMENTAL POWERS

- 5. By way of supplement to the Trustee Act 1925 it is expressly declared as follows:

- (a) The Trustee may in relation to the Reinsurance Contract or this Declaration of Trust act on the opinion or advice of, or a certificate or any information obtained from, any lawyer, banker, valuer, surveyor, securities company, broker, auctioneer or other expert in the United Kingdom or elsewhere and shall not if acting in good faith be responsible for any loss occasioned by so acting.

NOTE: mentioned in RRC 7, §2.16.

- (b) Any such opinion, advice, certificate or information may be sent or obtained by letter, telegram, telex, facsimile reproduction or in any other form and the Trustee shall not if acting in good faith be liable for acting on any opinion, advice, certificate or information purporting to be so conveyed although the same shall contain some error or shall not be authentic PROVIDED THAT such error or lack of authenticity is not manifest.
- (c) The Trustee shall as regards all rights, powers, authorities and discretions vested in it by the Reinsurance Contract or this Declaration of Trust, or by operation of law, have complete discretion as to the exercise or non-exercise thereof.
- (d) Any investment made by or on behalf of the Trustee pursuant to clause 4 may, at its discretion, be made or retained in the name or names of a nominee or nominees.
- (e) The Trustee shall be at liberty to place this Declaration of Trust and all deeds and other documents relating to the Reinsurance Contract or this Declaration of Trust with any bank or bank-

ing company, or lawyer or firm of lawyers, believed by it to be of good repute, in any part of the world, and the Trustee shall not be responsible for or be required to insure against any loss incurred in connection with any such deposit.

- (f) The Trustee may, in the conduct of the trust business, instead of acting personally, employ and pay an agent to transact or conduct, or concur in transacting or conducting, any business and to do or concur in doing all acts required to be done by the Trustee (including the receipt and payment of money). The Trustee shall not, provided that the Trustee has exercised reasonable care in the selection of any person appointed by it in good faith hereunder, be responsible for any misconduct on the part of any such person or be bound to suspend the proceedings or acts of any such persons.
- (g) The Trustee may refrain from doing anything which would or might in its opinion be contrary to any law of any jurisdiction or any directive or regulation of any agency of any state or which would or might otherwise render it liable to any person and may do anything which it reasonably believes to be necessary to comply with any such law, directive or regulation.
- (h)
 - (i) The Trustee shall not be bound to give notice to any person of either the execution of the Reinsurance Contract or this Declaration of Trust nor shall it be liable for any failure, omission or defect in perfecting the security intended to be constituted by the Reinsurance Contract or this Declaration of Trust including, without prejudice to the generality of the foregoing, (a) failure to obtain any licence, consent or other authority for the execution of the same, and (b) failure to effect or procure registration of or otherwise protect any of the Reinsurance Contract or this Declaration of Trust by registering the same under any registration laws in any territory, or by registering any notice, caution or other entry prescribed by or pursuant to the provisions of the said laws;
 - (ii) The Trustee shall not be responsible for the genuineness, validity or effectiveness of either the Reinsurance Contract or this Declaration of Trust or any obligations or rights created or purported to be created thereby or any security constituted or purported to be constituted by or pursuant to either the Reinsurance Contract or this Declaration of Trust, nor shall it be responsible or liable to any person because of any invalidity of any provision of such documents, whether arising from statute, law or decision of any court;
 - (iii) The Trustee shall not be liable or responsible for any loss, cost, damage, expense or inconvenience which may result from anything done or omitted to be done by it under the Reinsurance Contract or this Declaration of Trust, except such as arise as a result of the wilful misconduct or fraud of the Trustee.

SUPPLEMENTAL PROVISIONS REGARDING THE TRUSTEE

- 6.1 Except as herein otherwise expressly provided, the Trustee shall be and is hereby authorised to assume without enquiry, and it is hereby declared to be the intention of the Trustee that it shall assume without enquiry, that ERL is duly performing and observing all the covenants and provisions contained in the Reinsurance Contract and that Reinsured Names are duly performing and observing their duties and obligations owed by them in respect of the Secured Obligations. The Trustee shall only be required to take any action against ERL in respect of the Trust Property in the circumstances set out in clause 2 of this Declaration of Trust and shall incur no liability to Insurance Creditors, Reinsured Names or any other person for failing to take any action against ERL in any other circumstances. The Trustee shall not be required to take any action in respect of the failure by any Reinsured Name to perform its duties or obligations in respect of the Secured Obligations except as expressly provided herein.

| **that it shall assume:** *cf.* the similar provision at RRC 7, §2.4.

- 6.2 The Trustee may, in the execution of all or any of the trusts, powers, authorities and discretions vested in it by the Reinsurance Contract and this Declaration of Trust, act by responsible officers or a responsible officer for the time being of the Trustee. The Trustee may also, whenever it thinks expedient, whether by power of attorney or otherwise, for a period not exceeding 12 months delegate to any person or persons all or any of the trusts, rights, powers, duties, authorities and discretions

vested in it by the Reinsurance Contract and this Declaration of Trust. Any such delegation may be made upon such terms and conditions and subject to such regulations (including power to sub-delegate) as the Trustee may think fit and, PROVIDED THAT the Trustee shall have exercised reasonable care in the selection of such delegate and, where a power to sub-delegate has been given, has obliged the delegate to exercise reasonable care in the selection of any sub-delegate, the Trustee shall not be responsible for any loss incurred by any misconduct or default on the part of such delegate or sub-delegate.

- 6.3 The Trustee shall not, and no director or officer of the Trustee shall, by reason of the fiduciary position of the Trustee, be in any way precluded from making any contracts or entering into any transactions in the ordinary course of business with ERL or any Insurance Creditor or any Reinsured Name or from accepting the trusteeship of any stock, shares, debenture stock, debentures or securities of ERL or any of its subsidiaries or company connected with it. Neither the Trustee nor any such director or officer shall be accountable to any Insurance Creditor or any Reinsured Name for any profit, fees, commissions, interest, discounts or share of brokerage earned, arising or resulting from any such contracts or transactions. The Trustee and any such director or officer shall be at liberty to retain the same for its or his own benefit.
- 6.4 The powers conferred by the Reinsurance Contract and this Declaration of Trust upon the Trustee shall be in addition to any powers which may from time to time be vested in it by general law.
- 6.5 Sections 93 and 103 of the Law of Property Act 1925 shall not apply to this Declaration of Trust.

NOTE: Law of Property Act 1925, s.93 ("Restriction on consolidation of mortgages") provides: "(1) A mortgagor seeking to redeem any one mortgage is entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, solely on property other than that comprised in the mortgage which he seeks to redeem. This subsection applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them. (2) This section does not apply where all the mortgages were made before the first day of January, eighteen hundred and eighty-two. (3) Save as aforesaid, nothing in this Act, in reference to mortgages, affects any right of consolidation or renders inoperative a stipulation in relation to any mortgage made before or after the commencement of this Act reserving a right to consolidate." *Ibid.*, s.103 ("Regulation of exercise of power of sale") provides: "A mortgagee shall not exercise the power of sale conferred by this Act unless and until (i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or (ii) Some interest under the mortgage is in arrears and unpaid for two months after becoming due; or (iii) There has been a breach of some provision contained in the mortgage deed or in this Act, or in an enactment replaced by this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides covenant for payment of the mortgage money or interest thereon."

TRUSTEE'S REMUNERATION AND INDEMNITIES

7.1

- (a) Equitas shall pay or shall arrange for payment to the Trustee remuneration for its services upon the terms and conditions contained in letters from time to time entered into between Equitas and the Trustee.

Equitas shall: Equitas Ltd. is bound to perform this clause by RRC 4, §4.6.

letters from time to time entered into between Equitas and the Trustee: none are known to be publicly available.

- (b) If the Trustee finds it expedient or is required to undertake any additional or exceptional duties in the course of its trusteeship under this Declaration of Trust, Equitas shall pay such additional remuneration as shall be agreed between the Trustee and Equitas. If the Trustee and Equitas fail to agree an alteration in the annual remuneration or the amount of any additional remuneration as aforesaid, it shall be determined by a chartered accountant selected by the Trustee and approved by Equitas, or, failing such approval, nominated by the President for the time being of the Institute of Chartered Accountants in England and Wales. The expenses involved in such nomination and the fees of such chartered accountant shall be paid by Equitas. The determination of such chartered accountant (who shall be deemed to be acting as an expert and not as an arbitrator) shall be conclusive and binding upon the Trustee and Equitas.
 - (c) Equitas shall pay to the Trustee an amount equal to the amount of any value added tax or similar tax chargeable in respect of its remuneration hereunder.
- 7.2 In addition to remuneration hereunder, Equitas shall, on written request, pay all other reasonable costs, charges and expenses (including travelling expenses and any value added tax or similar tax) which the Trustee may incur in relation to the preparation and execution of the Reinsurance Con-

tract and this Declaration of Trust and the exercise of the rights, powers, duties, authorities and discretions or the execution of the trusts vested in it by or pursuant thereto. Reference in this sub-clause to costs, charges and expenses shall include value added tax or similar tax charged in respect thereof.

7.3 Equitas shall indemnify the Trustee and keep it indemnified:

- (a) in respect of all liabilities and expenses properly incurred by it or by any person appointed by it to whom any trust, power, authority or discretion may be delegated by it in the execution or purported execution of the trusts, powers, authorities or discretions vested in it by the Reinsurance Contract and this Declaration of Trust; and
- (b) against all losses, liabilities, actions, proceedings, costs, claims and demands in respect of any matter or thing done or omitted in any way relating to the Reinsurance Contract and this Declaration of Trust, except to the extent that they are sustained or incurred as a result of the wilful misconduct or fraud of the Trustee.

NOTE: and see RRC 7, §2.14. This clause operates before Equitas Policyholders Trustee has succeeded, following a RRC 7, §2.15 Insolvency Event, in appropriating Equitas Re's relevant assets as provided by RRC 7, §2.4, and presumably also to the extent that Equitas Policyholders Trustee has not so succeeded.

- 7.4 All sums payable under sub-clauses 7.2 and 7.3 of this clause shall be payable on demand. All sums payable by Equitas under this clause shall, in the case of any payment actually made by the Trustee prior to the demand, (if the Trustee so requires) carry interest at the rate of one per cent per annum above the normal lending rate of a leading bank in London, and (in all other cases) shall carry interest at such rate from the date fifteen days after the date of the same being demanded or being due or (whether the demand specified that payment will be made on an earlier date) from such earlier date.
- 7.5 Unless otherwise specifically stated in any discharge of these presents the provisions of this clause 7 shall continue in full force and effect notwithstanding such discharge.
- 7.6 The Trustee may also make any arrangement for payment of remuneration for its acting as Trustee hereunder or for the indemnification of it in respect of any liabilities and expenses incurred by it in so acting as Trustee with any person whatsoever in addition to any remuneration or indemnity it is entitled to hereunder and shall not be required to account to any Insurance Creditor, Reinsured Name or any other person in respect of such remuneration or indemnity.

ACTION OF TRUSTEES

- 8. Whenever there shall be more than two trustees hereof the majority of such trustees shall (provided such majority includes a trust corporation) be competent to execute and exercise all the trusts, rights, powers, duties, authorities and discretions vested by this Declaration of Trust in the Trustee generally.

APPOINTMENT OF NEW OR FURTHER TRUSTEE

- 9.1 The power of appointing new Trustees shall be vested in Equitas Holdings Limited. Equitas Holdings Limited may at any time by notice in writing to ERL and the Trustee remove any Trustee or Trustees for the time being hereof. The removal of a Trustee shall not become effective unless there remains at least one Trustee or Trustees in office after such removal. The provisions of section 37(1)(c) of the Trustee Act 1925 shall not apply to the extent that they are inconsistent with the provisions of this Declaration of Trust.

NOTE: Equitas Policyholders Trustee has no security of tenure in relation to the particular trusts of RRC 7.

Equitas Holdings Limited: Equitas Holdings' RRC 7, §9.1 power is not among the functions the exercise of which requires prior shareholder approval.

Trustee Act 1925, s.37(1)(c): Trustee Act 1925, s.37 ("Supplemental provisions as to appointment of trustees"), s.37 provides: "(1) On the appointment of a trustee for the whole or any part of trust property ... (c) it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least two [persons] to act as trustees to perform the trust"

- 9.2 Notwithstanding the provisions clause 9.1, the Trustee may, upon giving prior notice to ERL and EHL, appoint any person (whether a trust corporation or not) to act either as a separate trustee or as a co-trustee jointly with the Trustee:

| **EHL:** presumably Equitas Holdings Limited is meant.

- (a) if the Trustee considers such appointment to be in the interests of the Insurance Creditors or the Reinsured Names; or
- (b) for the purposes of conforming to any legal requirements or restriction.

Such person shall (subject always to the provisions of the Reinsurance Contract and this Declaration of Trust) have such trusts, rights, powers, duties, authorities and discretions (not exceeding those conferred on the Trustee by the Reinsurance Contract and this Declaration of Trust) and such duties and obligations as shall be conferred or imposed by the instrument of appointment. The Trustee shall have power in like manner to remove any such person. Such reasonable remuneration as the Trustee may pay to any such person, together with any attributable costs, charges and expenses incurred by it in performing its function as such separate trustee or co-trustee, shall, for the purposes of this Declaration of Trust, be treated as costs, charges and expenses incurred by the Trustee.

RETIREMENT OF TRUSTEE

10. Any Trustee for the time being of these presents may retire at any time upon giving not less than three months' notice in writing to ERL and EHL without assigning any reason therefor and without being responsible for any costs occasioned by such retirement. The retirement of a sole Trustee shall not take effect until the appointment of a new Trustee has been effected.

| **EHL:** presumably Equitas Holdings Limited is meant.

MODIFICATIONS

11. The Trustee may from time to time and at any time make any modification of this Declaration of Trust, if in the opinion of the Trustee such modification:
- (a) is of a formal, minor or technical nature; or
 - (b) is made to correct a manifest error; or
 - (c) is not prejudicial in the opinion of the Trustee to the interests of the Insurance Creditors or any Reinsured Name; or
 - (d) is made to perfect or give effect to any charge or security created or intended to be created by the Reinsurance Contract or this Declaration of Trust or to facilitate the exercise, or the proposed exercise, of any of the Trustee's powers or the protection, management or realisation of any of the Trust Property.

NOTICES

- 12.1 Each notice, request, demand, approval, certificate or other communication to be given or made by one person to another under this Declaration of Trust shall be given, made or served by telex, facsimile or letter to the following address, telex or facsimile number:

- (a) if to the Substitute Agent, to the address, telex or facsimile number or other address for service specified in or pursuant to the Reinsurance Contract;
- (b) if to the Trustee, to its registered office from time to time; and
- (c) if to ERL to the address, telex or facsimile number or other address for service specified in or pursuant to the Reinsurance Contract,

or to such other address, telex or facsimile number in the United Kingdom as such person may have notified to the Trustee by not less than 15 days notice in writing as the address, telex or facsimile number for the time being of such person.

- 12.2 Any communication to any person shall be deemed to be received by that person (if sent by telex or facsimile) when such communication has been despatched and the appropriate answerback or confirmation received or (if sent by letter) when left at the appropriate address or (as the case may be)

three days after being deposited in the post (first class postage prepaid) in an envelope addressed to such person at that address.

WAIVER

13. No course of dealing by the Trustee with any person and no failure or delay on the part of the Trustee to execute or exercise any trust, right, power, duty, discretion or authority under the Reinsurance Contract or this Declaration of Trust or provided by statute or by law or in equity or otherwise shall impair or operate as a waiver of any such trust, right, power, duty, discretion or authority or be construed as a waiver of any default or as an acquiescence therein. Any single or partial execution or exercise of any such trust, right, power, duty, discretion or authority shall not preclude any other or further execution or exercise thereof or the execution or execution of any other rights, privilege or remedies. The rights and remedies contained in the Reinsurance Contract and this Declaration of Trust are cumulative and not exclusive of any other right and remedy which the Trustee would have for the effective enforcement of the rights accorded in the Reinsurance Contract and this Declaration of Trust.

NOTE: On Equitas Policyholders Trustee's discretion to exercise its powers in the first place, see RRC 7, 65(c). On the company's specific powers, see for example *ibid.*, §§2.2 (power to determine merits of claim against Equitas Re); 2.2(a) (power to require written confirmation from Insurance Creditor); 2.3 (power to return to return money to Equitas Re); 2.4 (power to serve a RRC 4, §4.10 notice on Equitas Re); 2.11 (power to refrain from paying an Insurance Creditor). And see generally *ibid.*, §3.1(b).

TAXES

14. Notwithstanding anything herein contained, to the extent required by any applicable law, if the Trustee shall be required to deduct or withhold from any distribution or payment made by it hereunder or if the Trustee shall otherwise be charged to tax as a consequence of performing its duties hereunder, any amount for which the Trustee may be liable, whether as principal or agent, by reason of any assessment or prospective assessment to taxation of whatsoever nature and whensoever made upon the Trustee in connection with or arising from any sums received by it or to which it may be entitled under the Trust Property (other than in connection with its remuneration specified in clause 7) or any investments from time to time representing the same, including any income or gains arising therefrom or any action of the Trustee in or about the administration of the trusts of this Declaration of Trust (other than the remuneration specified in clause 7), the Trustee shall be entitled to make such deduction or withholding or, as the case may be, retention in respect of taxation. If the Trustee incurs any loss, cost, liability or expense by reason of any such assessment for which no such deduction or withholding or retention has been made by the Trustee or if any such deduction or withholding or retention is insufficient, Equitas will indemnify the Trustee therefor and the Trustee shall be entitled to reimbursement of such amounts from the Trust Property.

PARTIAL INVALIDITY

15. If any of the provisions of this Declaration of Trust becomes invalid, illegal or unenforceable in any respect under any law, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired.

GOVERNING LAW AND JURISDICTION

16. This Declaration of Trust and all the terms and provisions hereof and all questions of construction, validity and performance hereunder shall be governed by and construed in accordance with the laws of England. The courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature which may arise out of or in connection with this Declaration of Trust and any suit, action or proceeding arising out of such matters shall be brought in such courts.

IN WITNESS WHEREOF this Declaration of Trust has been executed as a deed by the parties hereof the day and year first above written.

EXECUTED as a DEED and DELIVERED by
EQUITAS POLICYHOLDERS TRUSTEES LIMITED
acting by two Directors / a Director and a Secretary

Director

Director / Secretary

Appendix 1.5

EquitasRe-reinsurance Trust trust deed (RRC 17)

INTRODUCTORY NOTE

A1.5-1 RRC 17 was entered into between the seven unincorporated “Original Trustees” (as defined¹), Equitas Holdings, Equitas Ltd. and the Corporation. It sets out the terms on which the trustees own and interact with Equitas Holdings (and thus also its three wholly owned subsidiaries Equitas Re, Equitas Policyholders Trustee and Equitas Management Services, and also Equitas Re’s own wholly owned subsidiary Equitas Ltd.). The arrangement is “essentially a mechanism for protecting and furthering the interests of Names as reinsureds under the Reinsurance Contract”.² The trustees’ functions should to some extent be considered with Equitas Policyholders Trustee’s parallel, notionally competing RRC 7 functions.

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¹ RRC 17, parties, §(2).

² *SOD*, p.95.

TRUST DEED [RRC 17]

[Unless otherwise stated, this is version FX962300.041/16]

THIS TRUST DEED is made the [3rd³] day of September 1996

BETWEEN:

- (1) THE SOCIETY INCORPORATED BY LLOYD'S ACT 1871 BY THE NAME OF LLOYD'S (*Lloyd's*);

NOTE: for RRC 17 use of "Lloyd's", see *ibid.*, recital (A), (B), §1.1 definition of "Names".

Lloyd's: the Corporation, and related myths, misinformation and misunderstanding are discussed elsewhere.⁴

- (2) SIR ADAM RIDLEY of 41 Tower Hill, London EC3N 4HA; VISCOUNT BLEDISLOE QC of Fountain Court Chambers, Temple, London EC4Y 9DH; MICHAEL DEENY of 60 Bedwin Street, Salisbury, Wiltshire SP1 3UW; DESMOND HEYWARD of Haseley Court, Little Haseley, Oxfordshire OX44 7LL; JOHN MAYES of 20 Beachcroft, Gallsworthy Road, Kingston-upon-Thames KT2 7BL; COLIN MURRAY of The Long House, Hurstbourne Priors, Whitechurch, Hampshire RG28 7SB; and RICHARD SPOONER of Creffield House, 2a Oxford Road, Colchester, Essex CO3 3HN; (together the *Original Trustees*);

NOTE: for RRC 17 use of "Original Trustees", see *ibid.*, recital (B), (D), preamble, §1.1 definition of "Trustees", §9.1(a).

Colin Murray: as at Equitas Holdings' last filed 363s Annual Return (December 11, 2001 as at December 5, 2001), he had been replaced by R. Keeling.

Original Trustees: for RRC 17 use, see *ibid.*, recital (B), (D), the line after recital (D); *ibid.*, §1.1 definition of "Trustees", §9.1(a). The appointment process has apparently not been made public.

- (3) EQUITAS HOLDINGS LIMITED a limited company registered in England and Wales with company number 3136296 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (*EHL*); and

NOTE: For RRC 17 use of "EHL", see *ibid.*, recital (A), §1.1 definition of "Articles", §§4.2, 5.1 heading, 5.1(a), (b), (c), (e), 5.2, 5.3, 5.4, 6.2(a), (b), 6.3, 6.4, 6.5, 6.6, 6.6(a), 7.1, 7.2, 8.1(c), (d), (e), (g), (i), (l), (m), (n), (p), 8.3, 8.4(a), (b), 9.1(b), 9.11, 9.11(b), 11, 12.1(a); Sch. 1 heading; Sch. 3 heading.

20-22 Bedford Row, London WC1R 4JS: obsolete: Equitas Holdings' registered office is presently 33 St. Mary Axe, London EC3A 8LL.⁵

- (4) EQUITAS LIMITED a limited company registered in England and Wales with company number 3173352 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (*EL*).

NOTE: For RRC 17 use of "EL", see *ibid.*, §§5.1 heading, 5.5, 6.2(a), (b), 6.3, 6.4, 6.5, 6.6, 6.6(a), 7.1, 7.2, 7.3, 8.1(e), (n), 9.11, 9.11(b).

EL: inconsistent with the abbreviation "Equitas" in RRC 4 and RRC 5.

20-22 Bedford Row, London WC1R 4JS: obsolete: Equitas Ltd.'s registered office is presently 33 St. Mary Axe, London EC3A 8LL.⁶

WHEREAS:-

- (A) At the date hereof the authorised share capital of EHL is £101 divided into two ordinary shares of £50 each which are issued and fully paid up to and owned by Lloyd's (the Ordinary Shares) and one deferred share of £1 which is issued and fully paid up and also owned by Lloyd's.

NOTE: Equitas Holdings' share capital is discussed elsewhere.⁷

³ The copy of version FX962300.041/16 used by the Publisher does not contain the execution date. On information presently available it appears that RRC 17 was executed contemporaneously with RRCs 4 and 5.

⁴ See p.196.

⁵ Equitas Holdings 363s December 11, 2001 annual return as at December 5, 2001, p.1.

⁶ Equitas Ltd. 363s December 11, 2001 annual return as at December 5, 2001, p.1.

⁷ See p.20.

| **paid up to:** error for “paid up”.

(B) Lloyd’s has delivered £10 to the Original Trustees to hold the same upon the trusts declared in this Trust Deed and has further agreed to transfer the Ordinary Shares to the Trustees for no consideration.

(C) It is proposed that once the Ordinary Shares are transferred to the Trustees they are to be held upon the trusts declared in this Trust Deed.

| **NOTE:** the trustees now do own the Ordinary Shares.

(D) The Original Trustees have agreed to act as the initial Trustees of this Trust Deed.

The Original Trustees have agreed:

NOW THIS DEED WITNESSETH AND IT IS HEREBY AGREED AND DECLARED as follows.

DEFINITIONS AND INTERPRETATION

1.1 In this Deed the following expressions shall where the context admits have the following meanings respectively:

Articles means the Articles of Association for the time being of EHL (the form of the Articles at the date hereof is set out in the First Schedule hereto);

| **NOTE:** Equitas Holdings’ latest Articles of Association are August 30, 1996 as amended by April 26, 2001 written members’ resolution. For RRC 17 use, see *ibid.*, §§5.3, 5.4, Sch. 1.

Discretionary Class means the charities and other bodies specified in the Second Schedule hereto;

| **NOTE:** for RRC 17 use, see *ibid.*, §§2.2, 2.4, 3.1, 3.3, 4.2, 6.2(c), 7.2, 8.1(i), 11, Sch. 2. See further RRC 17, §2.1.

| **Second Schedule:** error for Schedule 2.

Names means the underwriting members of the Society of Lloyd’s who are at any time bound by the terms of the Reinsurance Contract or under any contract with Equitas Reinsurance Limited on substantially the same terms and any person to whom the benefit of the Reinsurance Contract (or any contract with Equitas Reinsurance Limited on substantially the same terms) shall pass on the death of any such Name;

| **NOTE:** The definition collectivises RRC 4, Sch. 2, §1-defined “Names” and *ibid.* “Closed Year Names”; cf. RRC 7’s use of the phrase “Reinsured Name”. For RRC 17 use, see *ibid.*, 2.1 heading, 2.1, 2.2, 2.3, 4.2, 4.3, 5.1(d), 8.1(i), 11.

| **underwriting members:** see for example Lloyd’s Act 1982, Sch. 1.

| **Society of Lloyd’s:** a wholly fictitious entity.⁸ Additionally, the definition gives the erroneous impression that there is an entity separate and distinct from “Lloyd’s” as already RRC 17-defined.

| **any person to whom the benefit of the Reinsurance Contract (or any contract with Equitas Reinsurance Limited on substantially the same terms) shall pass on the death of any such Name:** see incidentally RRC 4, Sch. 2, §2(f). RRC 4 is not conditional on the Name or Closed Year Name being alive. In the nature of the Lloyd’s enterprise, a not insignificant number of Closed Year Names is likely to have died before RRC 4’s execution and their estates irretrievably distributed.

Reinsurance Contract means the Reinsurance and Run-off Administration Contract to be dated on or about 2 September 1996 and made between Equitas Reinsurance Limited and others;

| **NOTE:** for RRC 17 use, see *ibid.*, §1.1, definition of “Names”, §2.1.

| **Reinsurance and Run-off Administration Contract:** there is (for example) an R&R contract known as and entitled Reinsurance and Run-off Contract (in this work “RRC 4”) and a R&R contract known as and entitled Information and Administration Agreement (*viz.*, RRC 8), but apparently no relevant contract known as or entitled Reinsurance and Run-off Administration Contract. RRC 4 is presumably meant.

| **2 September:** RRC 4 is dated 3 September.⁹

Retrocession Agreement means the Retrocession Agreement to be dated on or about 2 September 1996 made between Equitas Reinsurance Limited and Equitas Limited;

| **NOTE:** in this work, “RRC 5”. For RRC 17 use, see *ibid.*, §5.5.

| **2 September:** RRC 5 is dated 3 September.¹⁰

⁸ See p.184.

⁹ See p.A30.

¹⁰ See p.A118.

Equitas Limited: The entity already abbreviated to “EL” is meant.

Subsidiary and Subsidiaries shall have the meaning ascribed thereto in Section 736 of the Companies Act 1985;

NOTE: for RRC 17 use, see *ibid.*, §§4.2, 8.1(c), (i), (l), (m), (p), 8.4(a).

Trustees means the Original Trustees and such other trustee or trustees as may be appointed in succession to any such person (or in succession to any other successor) as a Trustee of this Trust Deed in accordance with clause 9 of this Trust Deed;

NOTE: for RRC 17 use, see *ibid.*, *passim*.

Trust Period means the period ending eighty years less one day from the date hereof or such earlier date as the Trustees (having regard to clause 2.3) shall by deed declare to be the end of the Trust Period (not being a date earlier than the date of such deed);

NOTE: for RRC 17 use, see *ibid.*, §§2.1 heading, 2.1, 2.3, 3.1, 3.2, 3.3, 5.1, 6.2(a), 11.

Trust Property means the sum of £10 referred to in Recital (B) and (once transferred in accordance with Recital (C)) the Ordinary Shares and also all property at any time added thereto by way of further settlement, accumulation of income, capital accretion or otherwise and all property from time to time representing the same respectively;

NOTE: For RRC 17 use, see *ibid.*, §§2.1, 2.4, 3.1, 3.2, 3.3, 4.1 heading, 8.1(c), (j), 9.10. *Cf.* RRC 7, §1.1 Trust Property.

in accordance with Recital (C): infelicitous: recital (C) does not prescribe a transfer mechanism.

1.2 References to this Trust Deed shall include references to the same as amended from time to time in exercise of the power conferred by clause 11 hereof.

NOTE: no amendments are known of.

1.3 References herein to any enactment shall be deemed to include references to such enactment as re-enacted, amended or extended.

1.4 Where the context admits, words denoting the singular number only shall include the plural number also and vice versa and words denoting the masculine gender only shall include the feminine gender also and words denoting persons shall include bodies whether corporate or unincorporate.

1.5 References herein to the Schedules are to the schedules hereto which shall form part of this Trust Deed.

INTEREST OF NAMES AS REINSUREDS OR POTENTIAL REINSUREDS DURING THE TRUST PERIOD

2.1 Notwithstanding and in priority to the trusts declared in clause 3 below, the Trustees shall, during the Trust Period, exercise all powers and rights attaching to or exerciseable in respect of the Trust Property with a view to protecting and furthering the interests of the Names as a whole in their capacity as reinsureds or potential reinsureds under the Reinsurance Contract including their interest in receiving a return premium in accordance with the terms thereof.

NOTE: because of Equitas Holdings’ Articles, §114 prohibition on paying any dividend on any ordinary share, and the premium return provisions at RRC 4, §8 and *ibid.*, Sch. 5, there will be little or no capital or income value attaching to Equitas Holdings’ ordinary shares or any other RRC 17 Trust Property.¹¹ EquitasRe-reinsurance Trustees’ RRC 17, §2.1 addresses the trustees’ exercise of relevant rights as ordinary shareholders.

the Trustees: *viz.*, the Trustees acting in accordance with RRC 17, and otherwise presumably jointly.

protecting and furthering: *cf.* “advancement and protection” in the Corporation’s Lloyd’s Act 1911, s.4 second formal object.¹²

¹¹ *SOD*, p.95:-

Under the terms of the Equitas Trust, all capital and income arising in respect of the ordinary shares will be held for the benefit of a discretionary class comprising charitable purposes and other worthy causes in the UK. Any such capital or income will be distributed amongst such beneficiaries falling within this class as the Trustees may in their absolute discretion select at the end of the trust period or such earlier period as the Trustees may in their absolute discretion select. It should ... be noted that in view of the prohibition in the Articles of Association of Equitas Holdings on payment of any dividends or other distributions and the return premium mechanism under the Reinsurance Contract [RRC 4], it is most unlikely that any significant income will arise in respect of the ordinary shares or that the capital value attaching to such shares will amount to any significant value.

¹² The Corporation’s Lloyd’s Act 1911, s.4 formal objects are discussed in detail in *Astor’s Law of Lloyd’s*, 2nd ed.

Names as a whole: meaningless in practice: each SYA participant conduct his insurance business severally.

return premium: see generally RRC 4, Sch. 5.

- 2.2 In complying with the duty imposed on them by clause 2.1, the Trustees shall act solely in the interests of the Names as a whole as such reinsureds or potential reinsureds and shall not be under any duty to take into account the interests of the Discretionary Class or to take any steps to realise any income or capital so that the same may be available for distribution under clause 3 hereof to the Discretionary Class or to maximise the amount of any such income or capital which may be available.

Names as a whole: see annotation at RRC 17, §2.1.

not be under any duty to take into account the interests of the Discretionary Class: because that Class's RRC 17 property interest is bound to be negligible: see Note to RRC 17, §2.1.

realise any income: there will not be any income in relation to Equitas Holdings' ordinary shares: the company's Articles of Association prohibit the distribution of any dividend.¹³

- 2.3 The Trustees shall not declare an end to the Trust Period prior to the end of the period of eighty years less one day from the date hereof unless they believe it is in the interests of the Names as a whole as reinsureds or potential reinsureds so to do.

NOTE: see *SOD*, p.95.

declare an end to the Trust Period: the mere duration of RRC 17's Trust Period makes no difference to RRC 17's substantive trusts

Names as a whole as reinsureds: see RRC 4, §3 *et seq.*

- 2.4 No Name shall have any right to receive any distributions of income or capital from the Trust Property and, subject to compliance with the foregoing provisions of this clause, all such income and capital shall be held solely for the benefit of the Discretionary Class in accordance with clause 3.

any right: *cf.* RRC 7, §2.7(d). See RRC 4, §9.4(c).

distributions: raises considerable accounting, database and calculating issues.

income: there will not be any income in relation to Equitas Holdings' ordinary shares: the company's Articles of Association prohibit the distribution of any dividend.¹⁴

subject to compliance with the foregoing provisions of this clause: those provisions are the only claims having priority to the RRC 17, Sch. 2 "Discretionary Class".

REMAINING TRUSTS

- 3.1 Subject to clause 2, the Trustees shall during the Trust Period hold the income (if any) of the Trust Property upon trust from time to time to pay or apply the same to or for the benefit of all or any of the Discretionary Class as the Trustees may in their absolute discretion select.

NOTE: *cf.* RRC 17, §3.3, which addresses capital and income existing at the end of the Trust Period. The RRC 17, §3.1 obligation is without prejudice to the EquitasRe-reinsurance Trustees' RRC 17, §2 obligation.

to or for the benefit of all or any of the Discretionary Class: *cf.* the wider discretion in RRC 17, §3.1.

- 3.2 The Trustees may (notwithstanding the discretionary trust of income contained in clause 3.1) during the period of twenty-one years from the date hereof (or until the end of the Trust Period if that event shall occur earlier) if in their absolute discretion they think fit from time to time accumulate the whole or any part of the income of the Trust Property and add the accumulations to the capital of the Trust Property.

NOTE: on the EquitasRe-reinsurance Trustees' power to pay over capital, see RRC 17, §3.3.

- 3.3 Subject as aforesaid, the Trustees shall hold the Trust Property and the future income thereof at the end of the Trust Period upon such trusts in favour of or for any of the Discretionary Class as the Trustees shall prior to the end of the Trust Period by any deed or deeds (revocable or irrevocable) in their absolute discretion appoint (without offending the rule against perpetuities) and subject to and in default of any and every such appointment upon trust generally for purposes which are exclusively charitable according to the law of England for the time being in force.

NOTE: the value of the Trust Property will be minimal: see Note to RRC 17, §2.1.

¹³ See p.20.

¹⁴ See p.20.

the future income thereof: there will not be any income in relation to Equitas Holdings' ordinary shares: the company's Articles of Association prohibit the distribution of any dividend.¹⁵

RIGHTS ATTACHING TO THE TRUST PROPERTY

- 4.1 Subject to the trusts declared in clauses 2 and 3, the Trustees shall not sell or otherwise dispose of any interest in the Ordinary Shares.

NOTE: Equitas Holdings' Articles of Association prohibit¹⁶ transfer of the ordinary shares themselves other than between individual EquitasRe-reinsurance Trustees.

- 4.2 Save as otherwise expressly provided in this Trust Deed, the Trustees shall as regards all trusts, rights, powers, authorities and discretions vested in them by this Trust Deed, have absolute and uncontrolled discretion as to the exercise or non-exercise thereof and they shall not be in any way responsible for any loss, costs, damages, expenses or inconveniences whatsoever that may result from the exercise or non-exercise thereof and in particular the Trustees shall not incur any liability hereunder by reason of their failing to act (whether at the request or direction of the Names or any of them, any member of the Discretionary Class, any party hereto, or any other person having or claiming to have an interest or potential interest in the income thereof under any of the provisions of this Trust Deed or otherwise) and for the avoidance of doubt, the Trustees specifically shall not be bound or required to interfere in the management or conduct of the business of EHL or any of its subsidiaries (and it is understood and acknowledged that they will not in general do so) so long as they have no actual notice of any act of dishonesty or misappropriation by any directors or officers of EHL or its subsidiaries.

NOTE: on the rights and powers attaching to the EquitasRe-reinsurance Trustees' two jointly owned £50 ordinary shares in Equitas Holdings (the principal "Trust Property"), see principally the relevant provisions in Equitas Holdings' August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution). On the trustees' powers and discretions generally, see RRC 17, §8.

absolute and uncontrolled discretion: mentioned at *SOD*, p.96.

will not do so: (1) conceptually, the trustees are surrogates of EquitasRe-reinsured SYA participants, who apparently but for legal advice concerning US states securities law¹⁷ would be the owners of Equitas Holdings and presumably would take a proactive approach to supervising Equitas Re's affairs; (2) query if consistent with the trustees' RRC 17, §§2.1 and 2.2 (quasi-)fiduciary responsibilities to all EquitasRe-reinsured SYA participants. The trustees do not under RRC 17 owe fiduciary duties to Equitas Holdings: *ibid.*, §8.1(d)).

dishonesty or misappropriation by any directors or officers of EHL or its subsidiaries: the trustees presumably have a wider fiduciary duty to diligently oversee Equitas Re's performance of RRC 4 and Equitas Ltd.'s performance of RRC 5.

- 4.3 The rights of the Names under the trusts declared in this Trust Deed are personal and shall not be transferable or assignable.

EHL AND EL COVENANTS AND UNDERTAKINGS

- 5.1 EHL hereby undertakes to and covenants with each of the Trustees and each of them that for the duration of the Trust Period it shall:

each of the Trustees and each of them: presumably "the Trustees and each of them" is meant.¹⁸

- (a) procure that its directors and officers for the time being give to the Trustees or any person (not being a person to whom EHL can reasonably object) appointed in writing by the Trustees, such information as the Trustees are entitled to in their capacity as shareholders of EHL;

directors and officers: these are discussed elsewhere.¹⁹

shareholders of EHL: Equitas Holdings' share capital is discussed elsewhere.²⁰

- (b) supply to the Trustees two copies of every document issued to any other shareholders of EHL of any class as such as soon as reasonably practicable after the time of issue thereof;

¹⁵ See p.20.

¹⁶ Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §15 read with *ibid.*, §2 definition of "Permitted Transferee".

¹⁷ See p.20.

¹⁸ See p.15.

¹⁹ See p.21.

²⁰ See p.20.

any other shareholders of EHL of any class: viz., the Corporation as holder of the Deferred Share.²¹ The obligation does not expressly extend to documents provided to the Deferred Shareholder-appointed board member, viz., the Lloyd's Director.

- (c) as soon as reasonably practicable, notify the Trustees of any breach by EHL, of any of its obligations under this Trust Deed of which it is aware;

its obligations: on EHL's RRC 17 obligations, see for example *ibid.*, §§5.1(a) (provide information to the Trustees); *ibid.*, §(b) (provide copies of documents to the EquitasRe-reinsurance Trustees); the present provision *ibid.*, §(c); *ibid.*, §(d) (provide access to the register of Names); *ibid.*, §(e) (notify the EquitasRe-reinsurance Trustees of Equitas Holdings directorship changes); *ibid.*, §5.4 (consult with the chairman of the EquitasRe-reinsurance Trustees on appointing or removing directors); *ibid.*, §6.2(a) (pay each Trustee annual remuneration); *ibid.*, §6.3 (pay Trustees additional remuneration), *ibid.*, §6.5 (pay VAT or similar tax); *ibid.*, §6.6 (make other payments); *ibid.*, §7.1 (indemnify the Trustees).

- (d) provide access to the Trustees to the register of Names from time to time (or procure that Equitas Reinsurance Limited allows the Trustees such access) and send, if requested in writing by all the Trustees, to the Names on behalf of the Trustees any communications that the Trustees wish to make to the Names; and

register of Names: RRC 17 does not define the phrase, or otherwise refer to any register.²²

all: Equitas Holdings is entitled not to promulgate under RRC 17, §5.1(d) a communication desired in writing by only some of the trustees. Presumably as a practical matter Equitas Holdings would wish to give appropriate weight and publicity to a lone dissenting trustee's communication to EquitasRe-reinsured SYA participants; *a fortiori* that of more than one

- (e) as soon as reasonably practicable, notify the Trustees if any director of EHL ceases to be a director or if any person is appointed a director of EHL by its board of directors.

NOTE: Equitas Holdings' board is discussed elsewhere.²³

- 5.2 EHL hereby confirms that the persons named in the Third Schedule are all directors of EHL at the date hereof.

- 5.3 EHL hereby waives any rights or restrictions in the Articles or otherwise which might prevent the transfer of the Ordinary Shares to the Trustees.

NOTE: obsolete: Equitas Holdings' two ordinary shares have now been transferred to the EquitasRe-reinsurance Trustees.²⁴

- 5.4 EHL hereby agrees with the Trustees that prior to exercising any power under the Articles to appoint or remove any of its directors, to consult the Chairman of the Trustees on behalf of the Trustees in relation to it exercising such power of appointment or removal.

under the Articles: see Equitas Holdings' Articles, §§65-75 etc.

Chairman of the Trustees: on his appointment, see RRC 17, §8.4(a). On the trustees' obligation to notify Equitas Holdings in writing of their chairman's name and service address, see *ibid.*, §8(4)(b).

- 5.5 EL hereby agrees with the Trustees, to the extent reasonably practicable and subject to the duties of its directors to creditors and others, to consult the Chairman of the Trustees on behalf of the Trustees prior to implementing any Retrocession Plan in accordance with [clause 2.3 and Part I of Schedule 3]²⁵ to the Retrocession Agreement.

NOTE: On relevant consultation by Equitas Ltd., see RRC 5, Sch. 3, §§2.4 and 6.3.

Part I of Schedule 3: RRC 5, Sch. 3 does not have Parts.

REMUNERATION AND EXPENSES OF THE TRUSTEES

- 6.1 The Trustees shall be entitled to be remunerated and have their expenses discharged in acting as Trustees under this Trust Deed as set out in this clause 6.

6.2

- (a) EHL and EL hereby jointly and severally undertake to and covenant with the Trustees and each of them that (subject as hereinafter provided) in each and every year during the Trust Period, they shall pay or arrange to be paid to each of the Trustees and the Chairman of the Trustees for their respective services as Trustees and/or Chairman of the Trustees, as appropriate, as and by

²¹ See p.20.

²² See p.173.

²³ See p.20.

²⁴ See p.20.

²⁵ [The [] are *per* the original.]

way of remuneration for their services as Trustees and/or Chairman, such sums as are agreed between EHL, EL and the Trustees;

- (b) such remuneration shall be payable quarterly in arrears or as may otherwise be agreed between EHL, EL and the Trustees or (in respect of the Chairman's remuneration) the Chairman of the Trustees and shall be subject to review annually;

such remuneration shall be payable quarterly in arrears or as may otherwise be agreed: the terms of the Trustees' basic remuneration are set out in a fees letter agreed at the time they take office.²⁶

- (c) all such remuneration shall accrue from day to day and be payable in priority to payments to any members of the Discretionary Class.

6.3 In the event of the Trustees finding it expedient or being required to undertake any exceptional duties in the performance of their trusteeship or duties otherwise outside the scope of the normal duties of the Trustees under this Trust Deed, EHL and EL jointly and severally undertake that they shall pay or arrange to be paid such additional remuneration as shall be mutually agreed provided that the Trustees shall not undertake such duties without first using their best endeavours to consult with EHL and EL in relation to their carrying out such duties unless the Trustees (acting reasonably) conclude that the urgency of the need to carry out such duties, or the need in the particular circumstances for confidentiality makes such consultation impracticable.

exceptional duties: mentioned at *SOD*, p.96.

6.4 In the event of the Trustees EHL and EL:

- (a) failing to reach agreement upon a review of remuneration pursuant to clause 6.2(b); or
- (b) failing under clause 6.3 above to agree upon whether such duties are of an exceptional nature or otherwise outside the scope of the normal duties of the Trustees under this Trust Deed; or
- (c) failing to agree under clause 6.3 upon the remuneration payable thereunder,

such matters shall be determined by a merchant bank (acting as an expert and not as an arbitrator) selected by the Trustees and approved by EHL and EL or (failing such approval) nominated (on the application of the Trustees) by the President for the time being of The Law Society of England and Wales (the expenses involved in such nomination and the fee of such merchant bank being payable by EL) and the decision of any such merchant bank shall be final and binding on EHL, EL and the Trustees.

expert: *SOD*, p.96 refers to "independent expert".

6.5 EHL and EL jointly and severally undertake that they shall in addition pay or arrange to be paid to the Trustees (if so required) an amount equal to the amount of any value added tax or similar tax chargeable in respect of their remuneration hereunder or any other amount payable under this clause 6.

6.6 EHL and EL jointly and severally undertake that they shall also pay or discharge or arrange to be paid or discharged all liabilities properly incurred:

- (a) by the Trustees in relation to the preparation and execution of or the exercise of their powers and the performance of their duties under or any other matter concerning this Trust Deed including but not limited to travelling and other out-of-pocket costs, charges and expenses (including without limitation the fees and expenses of their legal and other advisers on a full indemnity basis) and any stamp and other taxes or duties paid by the Trustees and also in relation to any proceedings taken or contemplated by the Trustees against EHL or EL for enforcing any obligation under this Trust Deed; and
- (b) by any person duly appointed or employed by the Trustees or to whom any trust, duty, power, authority or discretion may be delegated by the Trustees in the performance or purported performance of their duties under this Trust Deed.

6.7 The provisions of clause 6.6 shall be without prejudice to clause 7.1.

²⁶ *SOD*, p.96, which indicates a "proposed" annual fee of £15,000 per Trustee. The Trustees' fees and reasonable expenses are payable by "Equitas": *SOD*, p.96.

TRUSTEE INDEMNITY

- 7.1 Without prejudice to the right of indemnity by law given to trustees, EHL and EL shall jointly and severally indemnify the Trustees and any persons appointed by the Trustees or to whom the Trustees have delegated any duty, trust, power, authority, right or discretion (each an *Indemnified Party* and together the *Indemnified Parties*) and each of them from and against all costs, claims, demands, expenses, actions, liabilities or obligations (*Claims*) incurred or suffered by the Indemnified Parties arising out of, or in any way related to or connected with, whether directly or indirectly, the execution or purported execution of any of the duties, trusts, powers, authorities, rights or discretions vested in the Trustees by this Trust Deed or any matter or thing done or omitted in any way relating to this Trust Deed provided that such execution or purported execution or such matter or thing has been either properly undertaken in the performance of the duties, discretions or powers of the Indemnified Parties (or any of them) under this Trust Deed or undertaken improperly but under an honest mistake.
- 7.2 Failing due payment by EHL or EL to an Indemnified Party of the amount of a Claim the Trustees may in priority to any payment to any member of the Discretionary Class retain and pay out of any money held in their hands upon the trusts of this Trust Deed the amount of such Claim and also the remuneration and expenses of the Trustees as hereinbefore provided (in which event the duty of EHL and EL shall become one to reimburse the Trust for the same).
- 7.3 EL hereby covenants that it will, as soon as reasonably practicable, enter into arrangements pursuant to which it shall establish a segregated and separately identified deposit account in its name into which it shall transfer the sum of ²⁷ and shall execute a charge in respect of such account under which it shall secure its obligations to indemnify the Indemnified Parties pursuant to clause 7.1 (but so that all interest on such account prior to an enforcement of the security shall be payable to EL). Under the terms of the charge the Trustees shall not be entitled to enforce the security created thereby unless they shall have first used all reasonable endeavours to make recovery under the terms of any indemnity insurance cover which they have taken out pursuant to clause 8.1(o) in respect of any claim for which they are indemnified pursuant to clause 7.1. EL and the Trustees agree to negotiate in good faith the form of such charge as soon as reasonably practicable from the date hereof.

POWERS OF THE TRUSTEES AND DECISION MAKING

- 8.1 Subject to the provisions of this Trust Deed, the Trustees shall have all the powers conferred upon a trustee by the Trustee Act 1925 or otherwise conferred by law and by way of supplement thereto it is expressly declared as follows:

NOTE: mentioned at SOD, p.96.

- (a) the Trustees shall have all requisite powers, authorities and discretions as shall be necessary or appropriate to enable them to take all and any such actions as it is contemplated by this Trust Deed that the Trustees should take and they may exercise the same as they think fit consistent with the express provisions hereof;
- (b) the Trustees as between themselves and the other parties hereto or any of them or any person having an interest or potential interest hereunder may at their discretion determine all questions and doubts arising in relation to any of the provisions of this Trust Deed and every such determination bona fide made (whether or not the same shall relate in whole or in part to the acts or proceedings of the Trustees under this Trust Deed) shall be conclusive and binding on the other parties hereto and any person having an interest or potential interest hereunder;
- (c) the Trustees need not disclose the existence of or send copies or extracts of or give any information relating to this Trust Deed, or any documents referred to in clause 5.1 hereof or any other documents which they may receive or otherwise have in their possession by reason of being the trustees of this Trust Deed or the holders of any of the Trust Property. to any party or any person having an interest or potential interest under the trusts herein declared other than a copy of this Trust Deed and any amendment thereto, copies of the accounts relating to EHL or any of its sub-

²⁷ [The figure in the copy available in the Publisher was blacked out.]

sidaries and copies of the documents relating to the ownership of and any dealings with the Trust Property (such supply of information and costs of copying to be at the expense of the person requesting the same);

- (d) the Trustees do not by virtue of this Trust Deed owe to EHL any duties or obligations as trustees or of a fiduciary nature (whether regarding the exercise or non-exercise by the Trustees of the powers and rights attaching to or exercisable in respect of the Trust Property or otherwise howsoever);
- (e) the Trustees may, in relation to the Trust Deed, appoint, employ and pay upon such terms as they think fit and act on the opinion, certificate or advice of, or information obtained from, any lawyer, valuer, banker, broker, accountant or other expert appointed by the Trustees and shall not be responsible for any liability occasioned by the same (and the costs of such advisers and experts shall be met (or be arranged to be met) by EHL or EL pursuant to clause 6.6);
- (f) the Trustees may at their discretion hold or deposit this Trust Deed and any deeds or documents relating to this Trust Deed in any part of the world with any banker or banking company or any company whose business includes undertaking the safe custody of deeds or documents or with any lawyer or firm of lawyers of good repute in any part of the world and the Trustees shall not be responsible for (or be required to insure against) any liability incurred in connection with any such holding or deposit and the Trustees may pay all sums required to be paid on account or in respect of any such deposit;
- (g) the Trustees may, in the conduct of the trust business, instead of acting personally, employ and pay an agent (including for the avoidance of doubt a secretary or clerk) whether or not a lawyer or other professional person, to transact or conduct (or concur in transacting or conducting) any business and to do or concur in doing all acts required to be done by the Trustees (including the receipt and payment of money) (and the costs of such agents shall be met (or arranged to be met) by EHL pursuant to clause 6.6) and provided the Trustees have exercised reasonable care in the selection of such person, the Trustees shall not be in any way responsible for any liability incurred by reason of any misconduct or default on the part of any such person appointed by them hereunder or be bound to supervise the proceedings or acts of any such person;
- (h) the Trustees may, whenever they think it necessary to enable them to perform their duties under this Trust Deed, delegate to any person or fluctuating body of persons all or any of the duties, trusts, powers, authorities, rights and discretions vested in the Trustees by this Trust Deed and any such delegation may be by a power of attorney or in such other manner as the Trustees may think fit and may be made upon such terms and conditions (including power to sub-delegate) as the Trustees may think fit; and provided the Trustees have exercised reasonable care in the selection of the delegate, the Trustees shall not be responsible for any liability incurred by reason of any misconduct or default on the part of any such delegate or sub-delegate or be bound to supervise the proceedings or acts of any such person;
- (i) a Trustee or any associate (as defined in section 435 of the Insolvency Act 1986) of a Trustee shall not be precluded at any time from contracting or entering into any financial or other transaction, including a contract of reinsurance, with, or being a director or employee or holding any office with, EHL or any subsidiary or associated body thereof and shall not be liable to account to the Names or any member of the Discretionary Class for any profit made by him (or any associate of his as aforesaid) thereby or in connection therewith;

associate ... as defined in section 435 of the Insolvency Act 1986: Insolvency Act 1986, s.435 provides (among other things) that “associate” includes spouse,²⁸ relative,²⁹ relative’s spouse,³⁰ partner,³¹ a partner’s spouse or relative,³² employer or employee,³³ trustee of a trust with relevant beneficiaries,³⁴ a company controlled by him or by him and his associates.³⁵

²⁸ Insolvency Act 1986, s.435(2).

²⁹ Insolvency Act 1986, s.435(2). “Relative” is defined at *ibid.*, s.435(8).

³⁰ Insolvency Act 1986, s.435(2). “Relative” is defined at *ibid.*, s.435(8).

³¹ Insolvency Act 1986, s.435(3).

³² Insolvency Act 1986, s.435(3). “Relative” is defined at *ibid.*, s.435(8).

³³ Insolvency Act 1986, s.435(4).

- (j) subject to clause 4.1, the Trustees may invest or apply the Trust Property and any income arising thereon as if they were the beneficial owner thereof;
- (k) the Trustees may open and operate bank accounts in connection with their acting as Trustees hereunder as they may in their absolute discretion think fit;
- (l) the Trustees may call for and may accept as sufficient evidence of any fact or matter or the expediency of any dealing, transaction, step or thing relating in any way (whether directly or indirectly) to EHL or any of its subsidiaries a certificate signed by a duly authorised officer on behalf of EHL or any subsidiary as to any such fact or matter or to the effect that (in the opinion of the person or persons so certifying) any such dealing, transaction, step or thing is expedient and the Trustees shall not be bound in any such case to call for further evidence or be responsible for any loss that may be occasioned by their failing so to do;
- (m) the Trustees may consent to any scheme or composition (including, without limitation any scheme of arrangement or compromise made under Section 425 of the Companies Act 1985 or any voluntary arrangement made under Sections 1 to 8 of the Insolvency Act 1986) in relation to EHL or any of its subsidiaries as they in their absolute discretion think fit;

NOTE: RRC 4, Sch. 3 does not expressly require or otherwise provide for EquitasRe-reinsurance Trustees' consent to anything.

Section 425 of the Companies Act 1985: this is discussed elsewhere.³⁶

voluntary arrangement made under Sections 1 to 8 of the Insolvency Act 1986: this is discussed elsewhere.³⁷

- (n) the Trustees may, subject to prior consultation with EHL as to the inclusion of the Trustees as named assureds under EHL's directors and officers liability insurance cover from time to time, insure and arrange insurance cover for and to indemnify themselves and their agents and servants from and against all such risks incurred in the course of the performance of their duties as may be thought fit (and the costs of such insurance if properly incurred shall be met (or arranged to be met) by EHL or EL);
- (o) any Trustee may (notwithstanding any rule of law to the contrary and without prejudice to the generality of the other powers conferred by this Trust Deed) by a deed revocable or irrevocable delegate to any other Trustee the exercise of all or any trusts powers duties and discretions conferred or imposed upon such Trustee (other than the power of delegation conferred by this paragraph) notwithstanding the fiduciary nature of such trust powers duties and discretions provided that no Trustee shall be capable of acting as a delegate of more than one Trustee for the purpose of attending and voting on behalf of any Trustee at a meeting of the Trustees;

trust: presumably error for "trusts".

- (p) no Trustee shall be obliged to disclose any information which he has acquired in his capacity as a director of EHL or any of its subsidiaries if such disclosure would amount to a breach of any duty or confidentiality which he owes to EHL or any such subsidiary in such capacity; and

duty or confidentiality: presumably error for "duty of confidentiality".

- (q) any consent, approval, authorisation or waiver given by the Trustees for the purposes of this Trust Deed may be given on such terms and subject to such conditions (if any) as the Trustees think fit.

8.2 The Trustees may meet together (which shall include a meeting by telephone or such other means as they in their absolute discretion think fit) for the despatch of business and may adjourn or otherwise regulate meetings as they think fit and:

- (a) a meeting of the Trustees shall be called by the chairman or any two Trustees giving no less than seven days written notice to each of the Trustees (or such shorter period as is agreed by all of the Trustees);

³⁴ Insolvency Act 1986, s.435(5); *q.v.* for detailed provisions.

³⁵ Insolvency Act 1986, s.435(7). "Control" is defined at *ibid.*, s.435(10). "Company" is defined at *ibid.*, s.435(11).

³⁶ See p.233.

³⁷ See p.229.

chairman: see RRC 17, §8.4(a).

- (b) a Trustee who participates in a meeting of the Trustees by telephone (or similar form of communication equipment) shall be deemed present at such meeting, shall be counted in the quorum and shall be entitled to vote. All business transacted at a meeting of the Trustees where one or more Trustees participate by telephone (or similar form of communication equipment) shall be deemed to be validly and effectively transacted (subject to the remaining provisions of this Trust Deed) although fewer than five Trustees are physically present at the same place and the meeting shall be deemed to take place where the largest group of those participating is assembled or, if there is no such group, where the chairman of the meeting then is;
- (c) subject to clauses 8.3, 9.3 and 9.8, a resolution of the Trustees must be passed by a majority of at least two thirds in number of the Trustees present and voting, with at least four Trustees voting in favour of the resolution;
- (d) subject to clause 8.3 and 9.3, four Trustees present at a meeting of the Trustees shall form a quorum;
- (e) any delegate of a Trustee appointed to attend a meeting pursuant to clause 8.1(o) shall be counted for quorum and voting purposes as a separate person in his capacity as such delegate;
- (f) the chairman of the Trustees appointed under clause 8.5 shall be the chairman at a meeting of the Trustees and in his absence the chairman of a meeting of the Trustees shall be nominated by the Trustees present; and

appointed under clause 8.5: error: RRC 17 has no such clause. Presumably *ibid.*, §8.4(a) is meant.

- (g) provided, except in the circumstances set out in clause 8.3, there are at least four Trustees, a resolution in writing signed by all the Trustees shall be as effectual as if it had been passed at a meeting of the Trustees and may consist of one or more documents in similar form each signed by one or more of the Trustees,

to the intent and so that any resolution passed in accordance with the above provisions shall be binding on all of the Trustees (whether they personally voted for or against such resolution or abstained) and any decision made or power or right or discretion exercised by any such resolution shall be regarded as made or exercised by the Trustees as a whole for all the purposes of this Trust Deed (except only for clauses 7.1(b), 9.7 and 11).

- 8.3 Notwithstanding clause 8.2(b) and (c), if there are at any time less than four Trustees, the remaining Trustees may, subject to clauses 9.3 and 9.8, by unanimous decision, exercise their power to appoint one or more new or additional Trustee(s) hereof and resolve how to exercise their power to exercise the votes attaching to the Ordinary Shares at a general meeting of EHL in respect of a resolution to re-elect a director of EHL retiring by rotation and to appoint an auditor of EHL but not otherwise. The remaining Trustees shall form a quorum in respect of a meeting of the Trustees called for any such purpose.

8.4

- (a) The Trustees shall, as soon as reasonably practicable from the date hereof, appoint one of their number as they think fit to be their chairman for the purpose of chairing meetings of the Trustees, liaising with EHL and its subsidiaries and acting as their general spokesman and they may from time to time appoint any of their number to replace the then current chairman as chairman;

NOTE: discussed in *SOD*, p.95.³⁸ The “senior” trustee on the Equitas shareholder books exercises both votes. The Chairman appears to be entitled to remuneration for holding office: *ibid.*, §6.2(a) and (b). RRC 17 gives him no security of tenure.

chairing meetings: see RRC 17, §8.2(f). On the chairman’s power to convene meetings, see *ibid.*, §8.2(a).

³⁸ *SOD*, p.95:-

The Equitas Trustees will appoint one of their number as chairman. In addition to the normal role of chairman of meetings of the Equitas Trustees, the chairman of the Equitas Trustees will be the main channel of communication between the Equitas Trustees and the boards of the Equitas companies (represented by the chairman of Equitas Holdings). It is expected that arrangements will be made for informal consultation between Equitas and the Equitas Trustees in addition to the more formal communications which a company normally has with its shareholders. In particular, the Equitas Trustees would be consulted if the implementation of proportionate cover were ever to arise under the Reinsurance Contract and on the appointment of directors by the board.

liaising with EHL: see RRC 17, §§5.4 (Equitas Holdings appointment or removal of any Equitas Holdings director). But see *ibid.*, §§5.1(a) (notification to the trustees' designated appointee); 5.1(c) (notification to all the trustees); 5.1(d) (ditto).

its subsidiaries: see RRC 17, §5.5 (Equitas Ltd. before it implements a Retrocession Plan).

- (b) the Trustees shall give written notice to EHL as soon as reasonably practicable of the name of the person appointed as chairman hereunder and his address for service of notices and of each subsequent person appointed as chairman together with such address.

RETIREMENT AND APPOINTMENT OF TRUSTEES

NOTE: retirement and appointment are mentioned at *SOD*, p.96-97.

9.1

- (a) The Original Trustees are hereby appointed as the first Trustees of this Trust Deed; and
- (b) a Trustee may retire at any time on giving not less than three months' prior written notice to EHL and the other Trustees without assigning any reason and without being responsible for any liabilities occasioned by such retirement provided that to give effect to such retirement a retiring Trustee must enter into a deed of retirement with the continuing Trustees (who must be at least two in number).

9.2 On the third anniversary of the date of this Trust Deed and every anniversary of such date thereafter, two Trustees shall retire as Trustees hereunder, unless the Trustees who are not due to retire on the date in question determine in accordance with clause 9.3 that one or both of such Trustees shall continue as Trustees. A Trustee who has retired in accordance with this clause 9.2 shall forthwith enter into a deed of retirement with the continuing Trustees.

9.3

- (a) The Trustees who are due to retire pursuant to clause 9.2 shall be the two Trustees who have been longest in office since their appointment as Trustee or since it was last determined pursuant to this clause 9.3 that such Trustee should not retire in accordance with clause 9.2 (and in the event that such period in office is the same for more than two such Trustees, the two Trustees who must retire shall be those two who are selected by the Trustees);
- (b) once it has been established which Trustees are due to retire pursuant to clause 9.2, the remaining Trustees shall determine at least three months prior to the date of such pending retirement whether or not one or both of such Trustees must retire or may continue in office (and for this purpose a resolution that any such Trustee is to continue in office shall be valid if passed by a simple majority in number of the remaining Trustees and such number of remaining Trustees shall form a quorum of any meeting called in order to determine the matter).

NOTE: on the conduct of meetings of the trustees, see generally RRC 17, §8.2 etc.

simple majority: *cf.* RRC 17, §8.2(c).

quorum: and see RRC 17, §8.2(d).

9.4

- (a) No appointment of a Trustee shall take effect unless the person so appointed is acceptable as a "fit and proper person" under the Insurance Companies Act 1982 (or satisfied the same or any similar test which may be imposed by any subsequent legislation) to the Department of Trade and Industry or any other successor department or other body for the time being responsible for any part of the regulation of the insurance industry in England and Wales;

NOTE: appointment of a fresh trustee under RRC 17 is made solely by the existing trustees. See also *ibid.*, §8.3.

appointment: the trustees are required to appoint new trustees by deed of appointment (RRC 17, §9.8(c)), acting unanimously (*ibid.*, §9.8(a))

"fit and proper person": *SOD*.³⁹ There is also the age issue: see RRC 17, §9.6.

³⁹ *SOD*, p.96:-

No appointment of a Trustee shall take effect unless the person appointed is acceptable to the DTI as a 'fit and proper' person as a controller of Equitas Reinsurance and Equitas Limited. If the DTI serves a written notice of objection to any Trustee continuing to be a controller, such Trustee shall be deemed to retire.

Insurance Companies Act 1982 (or satisfied the same or any similar test which may be imposed by any subsequent legislation: Insurance Companies Act 1982 has been repealed. The FSA has its own test.

Department of Trade and Industry or any other successor department or other body: the FSA is now the responsible authority.

- (b) if any Trustee ceases to be acceptable as a “fit and proper person” thereunder (or ceases to satisfy any such similar test) such Trustee shall be deemed to retire forthwith as a Trustee and shall forthwith enter into a deed of retirement with the continuing Trustees.

9.5 If a Trustee:

- (a) fails for a continuous period of six months to perform his duties as a Trustee hereunder (including, without limitation, failing to attend meetings of Trustees of which he has prior written notice); or
- (b) is incapable of acting as Trustee hereunder or is unfit to act (including, without limitation by reason of mental disorder within the meaning of the Mental Health Act 1983),

the other Trustees may by a deed of removal, remove such trustee and shall give notice of such removal to the removed Trustee (at his last known address).

9.6 No person aged 72 years or more may be appointed as a Trustee hereunder and any Trustee who attains the age of 72 shall be deemed to retire forthwith as trustee and shall forthwith enter into a deed of retirement with the continuing Trustees.

9.7 Notwithstanding clause 9.5, a Trustee may be removed as Trustee without notice by a unanimous decision of all of the other Trustees (being at least four in number) and the execution by such other Trustees of a deed of removal.

9.8

- (a) In the event of a vacancy arising due to the death of a Trustee or the retirement, deemed retirement or removal or a Trustee pursuant to the terms of this Trust Deed (but not where it is resolved pursuant to clause 9.3 that a Trustee who would otherwise have to retire pursuant to clause 9.2 may continue as Trustee) or arising under any applicable law or statute or there otherwise being for the time being fewer Trustees than the maximum number permitted by clause 9.9, the power of appointing new or additional Trustees shall be vested in the remaining Trustees acting unanimously.
- (b) The remaining Trustees shall use their best endeavours to appoint a replacement Trustee or replacement Trustees in the event of the number of Trustees falling below four for whatever reason.
- (c) The remaining Trustees and any new Trustee shall enter into a deed of appointment in relation to the appointment of the new Trustee (and if thought fit such deed of appointment may be contained in the same instrument as any deed of retirement or deed of removal hereunder).

9.9 The number of Trustees shall not exceed seven.

9.10 Each Trustee on retiring or being deemed to retire or being removed from office in accordance with this Trust Deed shall (in addition to entering into the deed required by clauses 9.1, 9.2, 9.4 or 9.6) execute all documents and do all things necessary to transfer and vest the Trust Property into the names of the Trustees including, without limitation, all instruments of transfer necessary to transfer the Ordinary Shares into the names of the Trustees.

9.11 Notwithstanding the foregoing provisions of this clause 9, the Trustees shall each be entitled to retire forthwith by notice in writing to the other Trustees, EHL and EL, even though on any such retirement there shall remain less than two Trustees if

And see *ibid.*, p.93 (“The Equitas Trust [EquitasRe-reinsurance Trust] will have seven trustees and their appointment is subject to their being acceptable to the DTI as ‘fit and proper’ persons in their capacities as ‘controllers’ as defined in the 1982 Act”).

- (a) the Trustees are unable to obtain or procure the continuance of a reasonable level of indemnity insurance cover in relation to the risks for which they are entitled to take out such insurance pursuant to clause 8.1(n); and
- (b) EHL and EL become in the reasonable opinion of the Trustees unable to meet their indemnity obligations pursuant to clause 7.1; and
- (c) in the reasonable opinion of the Trustees, the security arrangements established pursuant to clause 7.3 are or are likely to be unenforceable or inadequate to properly secure any liabilities secured thereby.

Without prejudice to the rights of the Trustees under this clause, the Trustees shall use all reasonable endeavours to appoint a professional Trust Corporation as Trustee hereof if the number of Trustees at any time falls below two and in default of such appointment, the appointment of new Trustees shall thereupon vest in the President for the time being of The Law Society of England and Wales. Any Trust Corporation appointed hereunder shall, with the consent of EHL, have the power (in addition to the power,⁴⁰ contained pursuant to clause 11) to modify this Trust Deed to make such amendments as may reasonably be required by such Trust Corporation.

professional Trust Corporation: as is, for example, Equitas Policyholders Trustee (see RRC 7).

as may reasonably be required: presumably “as may reasonably be required”.

PERPETUITIES

10. The perpetuity period for the purpose of this Trust Deed shall be the period of eighty years from the date hereof.

MODIFICATION

11. The provisions of this Trust Deed may at any time or times during the Trust Period be amended by any deed or deeds executed by the Trustees provided that no such amendment shall be made without the prior written consent of EHL and further provided that no amendment (other than to correct a manifest error) may be made which would materially prejudice the interests of the Names or any member of the Discretionary Class or which would compel further assets to be added to the property subject to this Trust Deed or alter the perpetuity period applicable hereto.

NOTICES

- 12.1 Any notice, demand, other document or payment required to be given, made, served or sent for any purposes of this Trust Deed to any party to this Trust Deed shall be given, made, served or sent by sending the same by pre-paid first-class post, or by fax:
 - (a) in the case of EHL, to its registered office;
 - (b) in the case of the Trustees collectively to each of the Trustees to their address shown in this Trust Deed or such other address as may be notified by such Trustee; and
 - (c) in the case of any notice to be served on any one of the Trustees, to his address as specified in this Trust Deed or such other address as may be notified by such Trustee.
- 12.2 Any notice sent by post as provided by this clause shall be deemed to have been duly given, made, served or sent if posted to an address in the United Kingdom forty eight hours after despatch and if posted to an address outside the United Kingdom seven days after despatch and any notice sent by fax shall be deemed to have been given at the time of its despatch.

INVALIDITY OF ANY PROVISION

13. If any provision of this Trust Deed is or becomes invalid, illegal or unenforceable in any respect under any law, the validity, legality and enforceability of the remaining provisions shall not be in any way affected or impaired.

validity: presumably error for “validity”.

⁴⁰ [This comma is anomalous.]

GOVERNING LAW

14. This Trust Deed shall be governed by and construed in accordance with the laws of England and Wales which shall be the proper law of this Trust Deed.

JURISDICTION, FORUM NON CONVENIENS AND SERVICE OF PROCESS

- 15.1 The courts of England are to have exclusive jurisdiction to settle any dispute which may arise in connection with the validity, effect, interpretation or performance of, or the legal relationship established by this Trust Deed or otherwise arising in connection with this Trust Deed.

- 15.2 Each party hereto irrevocably waives any objections on the grounds of forum non conveniens to the jurisdiction of the Courts of England.

NOTE: the controversies which arose in relation to the General Undertaking's adjudicating forum clause are unlikely to be repeated.

- 15.3 Each party hereto irrevocably consents to service of process or any other document in connection with proceedings in any court by personal service, delivery at any address specified in this Deed or any other usual address permitted by English law.

IN WITNESS whereof this Trust Deed has been entered into as a deed the day and year first above written.

THE COMMON SEAL of LLOYDS⁴¹ was hereunto affixed in the presence of:

EXECUTED as a DEED and DELIVERED by
SIR ADAM RIDLEY
in the presence of:

EXECUTED as a DEED and DELIVERED by
VISCOUNT BLEDISLOE
in the presence of:

EXECUTED as a DEED and DELIVERED by
MICHAEL DEENY
in the presence of:

EXECUTED as a DEED and DELIVERED by
DESMOND HEYWARD
in the presence of:

EXECUTED as a DEED and DELIVERED by
JOHN MAYS
in the presence of:

EXECUTED as a DEED and DELIVERED by
COLIN MURRAY
in the presence of:

EXECUTED as a DEED and DELIVERED by
RICHARD SPOONER
in the presence of:

EXECUTED as a DEED and DELIVERED by
EQUITAS HOLDINGS LIMITED
acting by two directors / a director
and a secretary

EXECUTED as a DEED and DELIVERED by
EQUITAS LIMITED
acting by two directors / a director and a secretary

⁴¹ [Apostrophe omitted in original.]

SCHEDULE 1

Initial Articles of EHL

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SCHEDULE 2

The Discretionary Class

The Discretionary Class consists of:

- (1) Any and every charitable company, charitable trust, charitable society or other charitable institution (whether incorporated or not) which is established in the United Kingdom for purposes which are exclusively charitable according to the law of England for the time being in force; and
 - (2) any and every body falling with Schedule 3 to the Inheritance Tax Act 1984 at the date of this Trust Deed (whether or not such body is a charity).
-

SCHEDULE 3

Initial Directors of EHL

David Newbigging
 Michael Crall
 Jane Barker
 Alan Pollard
 James Teff
 James Joll
 Sir Roger Neville
 John Webster

Appendix 2.1

Equitas American Trust Deed (EATD)

INTRODUCTORY NOTE

generally

A2.1-1 As a regulatory requirement, and as envisaged in *SOD*,¹ Equitas Re must maintain trust funds “to ensure that ... its assets are available for policyholders in those jurisdictions; and ... Lloyd’s can receive recognition for the Equitas reinsurance as an asset in solvency tests applied by overseas regulators”. Funds held in the EATF are taken into account when assessing the solvency of the Lloyd’s enterprise.² The EATD was entered into on September 3, 1996 (the same day as RRCs 4 and 5) between: (1) Equitas Re and Equitas Ltd. as co-grantors; (2) Citibank as a trustee of all LATFs, as beneficiary; (3) Citibank as the then³ EATF trustee. The EquitasRe-assured-at-Lloyd’s has no express right to payment out directly from the EATF.⁴ The EATD appropriates, to one agglomerated dedicated EATF, relevant assets in each of the multitudinous relevant personal-use LATFs of each EquitasRe-reinsured SYA participant, in order to securitise, in accordance with the EATD, Equitas Re’s RRC 4, §3 reinsurance obligations⁵ and Equitas Ltd.’s RRC 5, §2 retrocession obligations⁶ in relation to relevant “American Business” (as defined⁷). Maintained in New York, governed by New York law⁸ and supervised by the New York Insurance Department,⁹ the EATF was funded by draining¹⁰ the LATFs of relevant EquitasRe-reinsured SYA participants into the common EATF, and by the deposit into the EATF of assets from other sources.¹¹ The EATD is integrated into the LATD: see for example EATD, definition¹² and use¹³ of “Lloyd’s American Trust Fund”. EATD amendments must be approved by the Superintendent of Insurance of the State of New York.¹⁴ The initiative to terminate the trust may come only from Equitas Re or Equitas Ltd.,¹⁵ by serving a “Notice of Intention” accompanied by an appropriate report from one or more firms of independent actuaries concerning liabilities as at the report date.¹⁶

¹ See generally *SOD*, p.100-1.

² See for example *SOD*, p.100-101: “Equitas will be required to maintain certain overseas trust funds in order to ensure that: (a) its assets are available for policyholders in those jurisdictions; and (b) Lloyd’s can receive recognition for the Equitas reinsurance as an asset in solvency tests applied by overseas regulators.”

³ Brown Brothers Harriman Trust Co. is apparently the current EATF trustee.

⁴ Cf. LATD, §5.2; Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.3, Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §2.3.

⁵ See for example EATD, sixth and seventh recitals.

⁶ See for example EATD, eleventh recital.

⁷ See the definition of “American Business” at EATD, §1.

⁸ EATD, §14.

⁹ See for example EATD, §12(c)-(d). And see *SOD*, p.101 (“The EATF will be maintained in New York and will be governed by a deed which is being reviewed with, and for which approval is being sought from, the Superintendent of Insurance of the State of New York”).

¹⁰ See p.A192.

¹¹ See *SOD*, p.101 (“As a condition of the New York Insurance Department’s approval of the transfer of assets from the LATFs, to the EATF, Equitas has agreed to transfer additional assets into the EATF”).

¹² EATD, §1.

¹³ EATD, parties, recital [3], [4], [5], [6], [8], §1, §1 definition of “Beneficiary”, “Name”, §§3(a), 8, 12(a)(4)(a), 19.

¹⁴ EATD, §18(b).

¹⁵ See generally EATD, §13(a).

¹⁶ EATD, §13(a).

withdrawals; insufficiency

- A2.1-2** The EATF Beneficiary, Citibank NA, applies to the EATF Trustee, Brown Brothers Harriman Trust Co., to withdraw EATF monies when required by Equitas Re.¹⁷ The EATF Beneficiary then transmits that withdrawn money to itself as trustee of the particular relevant LATF of the particular liable EquitasRe-reinsured SYA participant,¹⁸ and disburses that money from that LATF at Equitas Re's direction. In the event of the EATD's insufficiency,¹⁹ the Trustee is required to notify the Superintendent of Insurance of the State of New York, and the latter is empowered to obtain a court order requiring the Trustee to transfer the trust fund's Assets to the Superintendent.²⁰ If and when so transferred, the Superintendent must then apply the Assets in accordance with New York law relating to the conservation of insurance companies.²¹ Any resulting surplus must be transferred by the Superintendent to Equitas Ltd.²²

TRUST AGREEMENT

[The version is LN\39482-2 9/6/96 2:48 pm]

Dated September 3, 1996,

among

EQUITAS REINSURANCE LIMITED and EQUITAS LIMITED,

as Grantor,

CITIBANK, N.A., in its capacity as the American Trustee of each of the separate Lloyd's American Trust Funds created under the Lloyd's American Trust Deed,

as Beneficiary,

NOTE: The reference to Citibank NA as "Beneficiary" is to it as trustee of relevant LATFs. The LATD authorises the Beneficiary to enter into the EATD: see LATD, §4.2(F).

and

CITIBANK, N. A.,

as Trustee

NOTE: Brown Brothers Harriman Trust Co. has now replaced Citibank NA as EATF trustee.

¹⁷ See for example *SOD*, p.101: "Citibank, as trustee of the LATFs, will exercise its rights as beneficiary of the EATF at the direction of Equitas (or its delegates) in Equitas' capacity as the run-off administrator for 1992 and prior business."

¹⁸ See for example *SOD*, p.101:-

Citibank, N.A. will serve as trustee of the EATF. Citibank will also be the beneficiary of the trust, but solely in its capacity as trustee of Names' LATFs. As beneficiary of the EATF and as trustee of the LATFs, Citibank will have the right to draw down funds in the EATF in order to pay Equitas' reinsurance payables to reinsured Names' LATFs. Once drawn down from the EATF and paid into the LATFs, the money will be used to pay the obligations of reinsured Names to their policyholders. ... In general, all money paid from the EATF will flow through Names' LATFs to policyholders.

¹⁹ See generally EATD, §12.

²⁰ EATD, §12(b) and (c).

²¹ EATD, §12(d).

²² EATD, §12(d).

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TRUST AGREEMENT, dated September 3, 1996 (this "Agreement"), among:

EQUITAS REINSURANCE LIMITED ("ERL"), a company incorporated in England, and its wholly-owned subsidiary, EQUITAS LIMITED ("EL"), a company incorporated in England (ERL and EL being referred to both individually and collectively as the "Grantor");

CITIBANK, N.A., a national banking association organized under the laws of the United States, in its capacity the American Trustee of each of the separate Lloyd's American Trust Funds created under the Lloyd's American Trust Deed referred to below (in such capacities, the "Beneficiary"); and

CITIBANK, N.A., a national banking association organized under the laws of the United States, as trustee hereunder (in such capacity, the "Trustee").

The Grantor, the Beneficiary and the Trustee are hereinafter each sometimes referred to individually as a "Party" and collectively as the "Parties".

WITNESSETH:

NOTE: the recital numbers have been editorially added.

- [1] WHEREAS, pursuant to a Reinsurance and Run-off Contract dated September 3, 1996 (the "Reinsurance Agreement"), ERL has agreed, inter alia, for the consideration set out in that agreement to reinsure and indemnify Names in respect of 1992 and Prior Business (as defined below) in accordance with the Reinsurance Agreement (such obligation to reinsure and indemnify being referred to in the Reinsurance Agreement and herein as the "Reinsurance Obligation");

Reinsurance and Run-off Contract dated September 3, 1996: viz., RRC 4.

- [2] WHEREAS, pursuant to a Retrocession Agreement of even date with the Reinsurance Agreement (the "Retrocession Agreement"), EL has agreed, inter alia, for the consideration set out in that agreement, to reinsure and indemnify ERL against such Reinsurance Obligation (such obligation of EL to reinsure and indemnify being referred to in the Retrocession Agreement and herein as the "Retrocession Obligation") in return for the payment by ERL to EL of a retrocession premium in an amount which, when added to an additional contribution to be made by ERL to EL, is equal to the aggregate of all reinsurance premiums to be paid to ERL by Names;

Retrocession Agreement of even date with the Reinsurance Agreement: viz., RRC 5.

- [3] WHEREAS, the Beneficiary is the American Trustee of the separate Lloyd's American Trust Funds created under the Lloyd's American Trust Deed, first declared on August 26, 1939, as thereafter amended and restated from time to time (as the same may be further amended and restated from time to time, the "Lloyd's American Trust Deed"), under which assets are held in the Lloyd's American Trust Funds to pay for, and to secure, the obligations of Names in respect of their American Business (as defined below);

the separate Lloyd's American Trust Funds: *viz.*, one for each relevant EquitasRe-reinsured SYA participant. Each relevant SYA participant having his own LATF is characteristic of a personal-use (*cf.* common-use) fund.

- [4] WHEREAS, pursuant to Section 4.1(A) of the Lloyd's American Trust Deed, the principal of the Lloyd's American Trust Funds may be used to pay, among other things, reinsurance premiums and other outgoings in connection with Names' American Business;

NOTE: see LATD, §1.3 definition of "American business".

- [5] WHEREAS, the Council of Lloyd's (the "Council") has exercised its powers under the Substitute Agents Byelaw (No. 20 of 1983) to appoint Additional Underwriting Agencies (No. 9) Limited as substitute agent (as described in paragraph 1.2(A)(ii) of the Lloyd's American Trust Deed) (the "Substitute Agent") of each Name in respect of 1992 and Prior Business;

Substitute Agent: see generally RRC 4, parties, "Additional Underwriting Agencies (No. 9) Limited".

- [6] WHEREAS, pursuant to Section 4.1(A) and 4.2(A) of the Lloyd's American Trust Deed, the Substitute Agent, as Agent (as defined in the Lloyd's American Trust Deed) of each Name, will instruct the Beneficiary to transfer from the Lloyd's American Trust Funds to the Trustee, for deposit to the trust fund created hereunder (the "Trust Fund"), certain cash and "Eligible Securities" (the "Deposited Funds") in order to pay, in part, reinsurance premium for ERL's Reinsurance Obligation in respect of American Business, and ERL will transfer its rights in respect of such Deposited Funds to the Trustee for deposit in the Trust Fund, in order to secure ERL's Reinsurance Obligation in respect of American Business, and the Trustee will acknowledge receipt of such Deposited Funds;

NOTE: relevant LATFs were drained²³ to help pay each relevant SYA participant's EquitasRe-reinsurance premium (on which see generally RRC 4, §5).

- [7] WHEREAS, pursuant to Articles Fourth and Fifth of the Lloyd's Central Fund United States Trust Deed (No. 2), the Council will instruct Citibank, N.A., in its capacity as trustee of the Central Fund United States Trust Fund (No. 2), to transfer from the Central Fund United States Trust Fund (No. 2), for deposit to the Trust Fund, certain cash and Eligible Securities (the "Additional Deposited Funds") in order to pay, in part, the reinsurance premium for ERL's Reinsurance Obligation in respect of American Business, and ERL will transfer its rights in respect of such Additional Deposited Funds to the Trustee for deposit in the Trust Fund, in order to secure ERL's Reinsurance Obligation in respect of American Business, and the Trustee will acknowledge receipt of such Additional Deposited Funds;

NOTE: CFUS 2 is outside this Edition's scope.²⁴

- [8] WHEREAS, the Lloyd's American Trust Deed provides that principal under the Lloyd's American Trust Deed includes all premiums and all other monies payable at any time during the Trust Term (as defined in the Lloyd's American Trust Deed) to the Name or to any person on behalf of the Name in connection with the American Business, requires all such monies to be paid or accounted for to the Beneficiary, and provides that until so paid or accounted for such monies shall be held on the trusts of the Lloyd's American Trust Deed;

that principal under the Lloyd's American Trust Deed includes all premiums [etc.]: see LATD, §2.1(i).

that until so paid [etc.]: see LATD, §2.2(A).

- [9] WHEREAS, pursuant to the Reinsurance Agreement, and in consideration of ERL's Reinsurance Obligation, the Substitute Agent, as Agent of each Name, has: (a) assigned to ERL all right, title and interest of the Name in the "Other Returns" (as defined below) and in the proceeds and the right to receive proceeds (whether or not accrued) of all Syndicate Reinsurances (as defined below) other

²³ See p.A192.

²⁴ It is fully treated at *Astor's Law of Lloyd's*, 2nd Ed.

than Financial Reinsurances (as defined in the Reinsurance Agreement); (b) covenanted that the Names and the Substitute Agent on their behalf will take all action directed by ERL to ensure that the benefit of the Financial Reinsurances of each Syndicate (as defined below), including, without limitation, rights to rebate or return of premium thereunder, and any credit, support, security or other rights granted in connection therewith, are transferred to and will enure to the benefit of ERL; and (c) ERL has directed Names to assign to ERL all of their right, title and interest in the proceeds and right to receive proceeds (whether or not accrued) of all Financial Reinsurances, (such proceeds of Other Returns, Syndicate Reinsurances and the Financial Reinsurances, to the extent they relate to American Business, being referred to collectively as the “Reinsurance Funds”);

assigned to ERL all right, title and interest of the Name in the “Other Returns”: see RRC 4, §6.1.

covenanted that the Names and the Substitute Agent on their behalf will take all action directed by ERL to ensure that the benefit of the Financial Reinsurances: see RRC 4, §6.6.

ERL has directed Names to assign to ERL [etc.]: see RRC 4, §6.7.

- [10] WHEREAS, ERL will transfer its rights in respect such Reinsurance Funds to the Trustee for deposit in the Trust Fund, and the Trustee will acknowledge receipt of such Reinsurance Funds;
- [11] WHEREAS, ERL will advise the Trustee that it will transfer to EL in order to pay, in part, the retrocession premium for, and EL will transfer to the Trustee for deposit to the Trust Fund in order to secure, EL’s Retrocession Obligation in respect of American Business, all of ERL’s right, title and interest in and to the Deposited Funds, the Additional Deposited Funds, and the Reinsurance Funds, subject to the trusts created under this Agreement, and the Trustee will acknowledge receipt of such advice;
- NOTE:** on consideration paid by Equitas Re to Equitas Ltd. under RRC 5, see generally *ibid.*, §3.
- [12] WHEREAS, ERL will transfer to EL and EL will transfer to the Trustee for deposit to the Trust Fund, and the Trustee will acknowledge receipt of, certain cash and Eligible Securities in order further to secure its Retrocession Obligation in respect of American Business;
- NOTE:** see generally RRC 5, §3.4.
- [13] WHEREAS, ERL and EL are together acting as Grantors under this Trust Agreement so that the reinsurance premium shall not at any time pass free from trust;
- [14] WHEREAS, the Trustee has agreed to act as Trustee hereunder, and to hold such assets in trust in the Trust Fund application in accordance with the terms hereof; and
- [15] WHEREAS, this Agreement is made for the sole benefit of the Beneficiary and for the purpose of setting forth the duties and powers of the Trustee with respect to the Trust Fund;

NOW, THEREFORE, for and in consideration of the mutual promises contained herein, and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties hereby agree as follows:

SECTION 1. Definitions. Except as the context shall otherwise require, the following terms shall have the following meanings for all purposes of this Agreement (the definitions to be applicable to both the singular and the plural forms of each term defined if both forms of such term are used in this Agreement). The defined terms shall be construed in accordance with the meaning given to such terms under the Reinsurance Agreement and/or the Lloyd’s American Trust Deed.

The term “1992 and Prior Business” shall mean any liabilities under contracts of insurance (whether direct or otherwise) or reinsurance underwritten at Lloyd’s (other than long term business as defined in the Insurance Companies Act (U.K.) 1982 or by a later similar statute) and originally allocated to the 1992 Year of Account or any earlier Year of Account including, without limitation, any such liabilities reinsured to close into the 1993 or any later Year of Account excluding any liabilities re-signed, or reallocated pursuant to a premium transfer, into the 1993 or later Year of Account.

NOTE: for EATD use, see *ibid.*, §1, definition of “Audit”, “Other Returns”, “Syndicate Reinsurances”, §§2(e), 4(a)(ii), (iii), (iv), (v), (b). The term is designed to correspond exactly with the same term in RRC 4 and LATD. For drafting infelicities, including multiple mis-use of “year of account”, see annotation to RRC 7, §1.1, definition of “1992 and Prior Business”.

The term “Affiliate” shall mean, with respect to any person, a person which directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such person.

NOTE: for EATD use, see *ibid.*, §1, definition of “Eligible Securities”, §§5(f), 9(n), (s), (t), 11(b).

The term “American Business” shall mean such part of a Name’s underwriting business at Lloyd’s (other than long term business as defined from time to time by the Insurance Companies Act (U.K.) 1982 or by a later similar statute) as complies with the following two conditions: (i) the liability of the Name respect thereof is expressed in U.S. dollars; and (ii) the premium payable to or for the account of the Name has been paid or is payable in U.S. dollars; excluding all such business as comprises any contract or policy of insurance or reinsurance underwritten or incepting on or after August 1, 1995 except for: (a) contracts or policies underwritten under a binding authority incepting prior to that date; (b) contracts or policies of insurance written pursuant to Lloyd’s license in Kentucky prior to January 1, 1996; and (c) any contract of Reinsurance to Close for any Year of Account prior to the 1995 Year of Account underwritten by a Name (to the extent only that the premium payable to or for the account of the Name has been paid or is payable in U.S. dollars or the liability of the Name in respect of such contract is expressed in U.S. dollars).

NOTE: for EATD use, see *ibid.*, recital [3], [4], [6], [7], [8], [11], [12], §1, definition of “Name”, “Obligations”, “Policyholder”, §§2(e), 4(a)(i), (ii), (iii), (iv), (v), (b), (c), 12(a)(4)(a), (d). Cf. LATD, §1.3 “American business”. The definition (Like LATD’s definition of “American business”) does not necessarily protect any US assured-at-Lloyd’s: see the relevant annotation to LATD, §1.3.

The term “Audit” shall mean the audit to be conducted by Syndicate auditors after September 1, 1996 for the purpose verifying the amount of assets held by Syndicates in respect of 1992 and Prior Business which should have been transferred to the Grantor and/or as the Grantor directed pursuant to the Reinsurance Agreement.

NOTE: for EATD use, see *ibid.*, 4(a)(vi), 9(g), (h).

The term “Beneficiary” shall mean the trustee from time to time under the Lloyd’s American Trust Deed, and any successor or replacement trustee, including any successor by operation of law, including, without limitation, any liquidator, rehabilitator, receiver or conservator.

NOTE: for EATD use, see *ibid.*, parties, recital [3], [6], [8], [15], §1 definition of “Eligible Securities”, §§2(a), (c), 3(a), (b), 4(a)(vii), (viii), (b), 5(c), (f), 8 heading, 8, 9(a), (b), (e), (f), (g), (j), (o), (p), (q), (r), 11(a), (b), 13(a), (b), (c), 19. The EATD Beneficiary is LATD Trustee: see EATD, parties. The Beneficiary is authorised by the LATD to perform its EATD Beneficiary functions: see LATD, §4.2(F).

The term “cash” shall mean United States legal tender.

NOTE: for EATD use, see *ibid.*, recital [6], [7], [12], §§5(c), (d), 9(s).

The term “control” including the related terms “controlled by” and “under common control with”) shall mean, with respect to any person, the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such person, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise; but no person shall be deemed to control another person solely by reason of his being an officer or director of such other person. Control shall be presumed to exist if any person directly or indirectly owns, controls or holds with the power to vote fifty (50%) percent or more of the voting securities of any other person.

NOTE: for EATD use, see *ibid.*, §1, definition of “Affiliate”, “Parent”, “Subsidiary”.

The term “Council” shall mean the Council of Lloyd’s constituted by Lloyd’s Act 1982, and shall include its delegates and persons by whom it acts.

NOTE: for EATD use, see *ibid.*, recital [5], [7], §1 definition of “Qualifying Reinsurance”, “Syndicate”.

Lloyd’s Act 1982: viz., Lloyd’s Act 1982, s.3.

The term “Eligible Securities” shall mean and include certificates of deposit issued by a United States bank and payable in United States legal tender, including those issued by the corporation acting as Trustee, or any successor Trustee, or the corporation acting as Beneficiary, and securities, including those issued by the corporation acting as Trustee, or any successor Trustee, or the corporation acting as Beneficiary, representing investments of the types specified in paragraphs (1), (2), (3), (8) or (10) of subsection (a) of Section 1404 of the New York Insurance Law; provided, however, that no such securities shall have been issued by a Parent, a Subsidiary or an Affiliate of the Grantor.

NOTE: for EATD use, see *ibid.*, recitals [6], [7], [12], §§2(c), 5(b), (c), (d), 6, 9(c).

Section 1404 of the New York Insurance Law: “Types of reserve investment permitted for non-life insurers.”

The term “Investment Manager” shall have the meaning given to it in Section 5(f) hereof.

NOTE: for EATD use, see *ibid.*, §§5(f), 7, 9(e), (f), (j), (p), (q), (r).

The term “Lloyd’s American Trust Fund” shall have the meaning set forth in the Lloyd’s American Trust Deed.

NOTE: for EATD use, see *ibid.*, parties, recital [3], [4], [5], [6], [8], §1, §1 definition of “Beneficiary”, “Name”, §§3(a), 8, 12(a)(4)(a), 19.

The term “Name” shall mean an underwriting member of Lloyd’s, or former underwriting member of Lloyd’s, for an underwriting Year of Account, who is, or was, acting in such capacity, and who is a party to the Lloyd’s American Trust Deed in respect of his or her American Business, including the individual member’s executors and any administrator, administrative receiver, committee, curator, liquidator, manager, personal representative, supervisor or trustee in bankruptcy or any person entitled or bound to administer the affairs of the member concerned.

NOTE: for EATD use, see *ibid.*, recital [1]–[6], [8], [9], §1 definition of “American Business”, “Obligations”, “Policyholder”, “Syndicate Reinsurances”, §§2(d), 4(a)(i)–(vii), (b), 9(d), (f).

The term “Obligations” shall mean, with respect to the American Business of the Names reinsured under the Reinsurance Agreement and retroceded under the Retrocession Agreement: (a) losses and allocated loss expenses paid or currently required be paid by the Name, but not recovered from the Grantor; (b) reserves for losses which are owed by the Name and which have been reported and are outstanding; (c) reserves for losses which are owed by the Name and which have been incurred, but not reported; (d) reserves for allocated loss expenses; (e) reserves for unearned premiums; and (f) any other amounts constituting part of the Reinsurance Obligation or Retrocession Obligation the Grantor in respect of American Business. The Grantor shall determine the amount of any Obligations, when required in accordance with Section 4(a) (viii) and Section 13 hereof, in accordance with the accounting principles applied for solvency purposes by the Department of Trade and Industry or its successor as the primary U.K. regulator of the Grantor for solvency matters.

NOTE: for EATD use, see *ibid.*, §§4(a)(vii), (viii), (c), 9(u), 12(d), 13(a).

losses and allocated loss expenses paid or currently required be paid by the Name, but not recovered from the Grantor: in EATD (as in LATD), no express mention is made of exemplary or punitive damages: *cf.* Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.3(i); Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §1.3(i).

the Department of Trade and Industry or its successor: the DTI no longer regulates UK insurance companies, and the principal statute (Insurance Companies Act 1982) has been repealed.

The term “Other Returns” shall mean, in respect of any Syndicate, all rights (howsoever arising) in respect of income receivable (other than in respect of Syndicate Reinsurances), including premiums, return premiums, salvages, claim refunds and any moneys which may be applied in reducing the amount of any liability comprised in 1992 and Prior Business.

NOTE: for EATD use, see *ibid.*, recital [9]. See RRC 4, §§6.1, 6.3 etc.

The term “person” shall mean an individual, firm, association, corporation, limited liability company, partnership, limited liability partnership, trust, unincorporated organization or a government or political subdivision thereof, or any other legal, business or governmental entity.

NOTE: for EATD use, see *ibid.*, recital [8], §1 definition of “Affiliate”, “control”, “Council”, “Name”, “Parent”, “Subsidiary”, “Syndicate Reinsurances”, §§2(c), (d), 5(f), 8, 9(b), (f), (j), (o), 17.

The term “Parent” shall mean, with respect to any person other than an individual, a person that, directly or indirectly, controls such person.

NOTE: for EATD use, see *ibid.*, §1 definition of “Eligible Securities”, §§5(f), 9(n), (s), (t), 11(b).

The term “Policyholder” shall mean any policyholder whom a Name is liable in respect of American Business.

NOTE: for EATD use, see *ibid.*, §§4(a)(ii)–(v), 12(a)(4)(b). Note the absence of any territorial stipulation: *cf.* the territorial approach in (for example) Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.15 (definition of “Policyholder”); similarly Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §1.2 (definition of “Ceding Insurers”). See the annotation to LATD, §1.19 (definition of “Policyholder”).

The term “Qualifying Reinsurer” shall mean an insurance company designated by the Council for the purpose of providing Reinsurance to Close.

NOTE: for EATD use, see *ibid.*, §1 definition of “Reinsurance to Close”.

an insurance company designated by the Council for the purpose of providing Reinsurance to Close: conventional RTC is effected between participants on two different YAs, usually of the same syndicate. RTC (as distinct from, for example, whole-account reinsurance²⁵) between participants on a SYA and, on the other hand, a conventional insurance company is highly unusual. Neither Centrewrite nor Equitas Re is a conventional insurance company.

The term “Reinsurance Obligation” shall have the meaning set forth in the first recital hereto.

NOTE: for EATD use, see *ibid.*, recital [1], [2], [6], [7], [9], §1 definition of “Obligations”, “Reinsurance to Close”, §§4(a)(i), 4(c).

The term “Reinsurance to Close” shall mean:

NOTE: for EATD use, see *ibid.*, §1 definition of “American Business”, “Qualifying Reinsurer”.

- (a) in relation to any Year of Account of a Syndicate, including without limitation, the 1993, 1994 or 1995 Year of Account, a reinsurance agreement under which members of a Syndicate for a Year of Account agree with the members of the same or another Syndicate for a later Year of Account or a Qualifying Reinsurer that the reinsuring members, or the Qualifying Reinsurer, as the case may be, will indemnify the members to be reinsured, without limit, against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through the Syndicate and allocated to the closed Year of Account; or

NOTE: RTC is considered elsewhere.²⁶

1993, 1994 or 1995 Year of Account: error for “1993, 1994 or 1995 underwriting year”.

for a Year of Account: ambiguous and imprecise. A year of account *of* a syndicate is meant.

reinsuring members: error: RTC is not reinsurance.

reinsured members: error: see note above.

underwritten through the Syndicate: infelicitous: a syndicate properly so called cannot and does not underwrite anything or otherwise do business.

- (b) in relation to the 1993 or 1994 Year of Account of a Syndicate, a reinsurance agreement whereby any Qualifying Reinsurer agrees to indemnify without limit the members of that Syndicate for that Year of Account against all 1992 and Prior Business reinsured to close into that Year of Account, taken together with an unlimited reinsurance agreement whereby the members of the same or another Syndicate for a later Year of Account or a Qualifying Reinsurer agree to reinsure all liabilities of the reinsured members arising out of insurance business underwritten through that Syndicate and allocated to the closed Year of Account other than 1992 and Prior Business; and for purposes of this definition only, the Reinsurance Obligation shall be deemed to be without limit.

The term “Retrocession Obligation” shall have the meaning set forth in the second recital hereto.

NOTE: for EATD use, see *ibid.*, recital [2], [11], [12], §1 definition of “Obligations”, §4(c).

The term “Subsidiary” shall mean, with respect to any person other than an individual, a person controlled, directly or indirectly, by such person.

NOTE: for EATD use, see *ibid.*, §1 definition of “Eligible Securities”, §§5(f), 9(n), (s), (t), 11(b).

The term “Syndicate” shall mean a group consisting of underwriting members of Lloyd’s, to which a particular number is assigned by or under the authority of the Council, for whose account an underwriter accepted or accepts insurance or reinsurance business at Lloyd’s.

NOTE: for EATD use, see *ibid.*, recital [9], §1 definition of “Audit”, “Other Returns”, “Reinsurance to Close”, “Syndicate Reinsurances”, “Year of Account”. The definition is defective: see RRC 4, Sch. 2, §1 definition of “syndicate” and “Syndicate”.

The term “Syndicate Reinsurances” shall mean, in respect of any Syndicate, those reinsurance contracts (excluding the Reinsurance Agreement) taken out by the Syndicate, and those which enure to the benefit of the Syndicate taken out by any other Syndicate reinsured to close, either directly or indirectly, by the Syndicate (or otherwise in respect of 1992 and Prior Business), but excluding any claim, right, title, benefit or interest under personal stop loss, estate protection reinsurance and individual run-off policies purchased on behalf of any Name for his own account.

NOTE: for EATD use, see *ibid.*, recital [9], §1 definition of “Other Returns”. See generally for example RRC 4, §6.1.

²⁵ See p.A38.

²⁶ See p.207 *et seq.*

The term “Year of Account” shall mean a year which is accounted for as a separate underwriting venture by a Syndicate under Lloyd’s system of accounts.

NOTE: multiply defective: (1) a YA is not a (twelve month or any other) time period; (2) a syndicate does not underwrite anything; (3) a YA is not a “venture”; (4) “venture by a Syndicate” is nonsensical: for example, a syndicate is incapable of venturing. For EATD use, see *ibid.*, §1 definition of “1992 and Prior Business”, “American Business”, “Name”, “Reinsurance to Close”.

SECTION 2. Deposit of Assets in the Trust Fund.

- (a) The Grantor hereby establishes the Trust Fund with the Trustee for the sole benefit of the Beneficiary upon the terms and conditions hereinafter set forth. The Grantor has transferred to the Trustee, for deposit in the Trust Fund, the assets described in Exhibit A hereto, and may transfer to the Trustee, for deposit in the Trust Fund, such other assets as the Grantor may from time to time be required or desire to deposit (all such assets are herein referred to individually as an “Asset” and collectively as the “Assets”). The Assets in the Trust Fund shall be subject to withdrawal by the Beneficiary solely as provided herein.

the sole benefit of the Beneficiary: *viz.*, so that EATD funds can be infused back to relevant LATFs as appropriate.

the assets described in Exhibit A: the Exhibit A seen by the Publisher is blank. EATD trust property (“Assets” as defined²⁷) includes:-

(1) money extracted from relevant LATFs (*viz.*, personal-use funds),²⁸ Assets in the LATFs of EquitasRe-reinsured SYA participants were extracted by the LATFs’ trustee (then and now Citibank NA), and then transferred to EATF’s trustee (then Citibank NA; now Brown Brothers Harriman Trust Co.), on the instructions of AUA 9²⁹ acting on behalf of relevant EquitasRe-reinsured SYA participants and intimately directed by the Council.³⁰ The money was part consideration — that is, it was part premium³¹ — for Equitas Re’s RRC 4, §3 obligation to the extent of “American Business” (as defined in the EATD³²). In the EATD, such LATF-derived funds are called the “Deposited Funds”.³³ The transfer was unconditionally authorised by the New York Insurance Department’s Superintendent.³⁴ The money happens to have been deposited in the EATD rather than in Equitas Re’s personal funds in order to securitise Equitas Re’s relevant performance of RRC 4, §3;³⁵

(2) further such premium extracted from Lloyd’s Central Fund United States Trust Fund (No. 2) (*viz.*, a common-use fund, the funds in which were derived from an extraordinary Central Fund levy³⁶). It was extracted by that fund’s trustee (Citibank NA), and then transferred to EATF’s then trustee (Citibank NA), at the Council’s direction. In the EATD, such CFUS 2-derived funds are called the “Additional Deposited Funds”.³⁷ They happen to be in the EATD rather than in Equitas Re’s personal funds in order to securitise Equitas Re’s relevant performance of RRC 4, §3;³⁸

(3) EquitasRe-reinsured SYA participants’ rights to “Other Returns” (as defined³⁹) and the proceeds of “Syndicate Reinsurances”⁴⁰ (as defined⁴¹). Those rights had already been assigned to Equitas Re.⁴² They happen to form part of the EATD rather

²⁷ See the definition at EATD, §2(a).

²⁸ See generally for example *SOD*, p.101: “It is intended that the EATF should be funded principally by the portion of Names’ Equitas premium which is being paid out of Names’ LATFs.”

²⁹ See EATD, recital [5]; LATD, §1.2(A)(ii).

³⁰ See EATD, recital [6]; LATD, §4.1(A) and 4.2(A).

³¹ See EATD, recital [6].

³² See the definition at EATD, §1. *Cf.* the different definition (and use of lower case for “business”) at LATD, §1.3.

³³ See EATD, recital [6]. “Cash” means US legal tender: *ibid.*, §1. “Eligible Securities” includes certificates of deposit issued by a US bank including Citibank, and excludes securities issued by a parent, subsidiary or affiliate of Equitas Re or Equitas Ltd.: *ibid.*, §1; *q.v.* for full definition.

³⁴ See for example September 3, 1996 letter from the Superintendent to the Chairman of Lloyd’s and the Vice President of Citibank giving unconditional approval. See also the Superintendent’s previous September 3, 1996 letter to the same parties setting out various conditions for his authorisation.

³⁵ See for example EATD, recital [6].

³⁶ See EATD, recital [7].

³⁷ See EATD, recital [7].

³⁸ See for example EATD, recital [7].

³⁹ At EATD, §1.

⁴⁰ EATD, recital [9].

⁴¹ At EATD, §1.

⁴² See RRC 4, §6; EATD, recital [9].

than Equitas Re's choses in action in order to securitise Equitas Re's relevant performance of RRC 4, §3;⁴³ Equitas Re and Equitas Ltd. also agreed to promptly transfer to the Trustee actual relevant reinsurance recoveries;⁴⁴

(4) certain Equitas Ltd. rights in certain outward reinsurance recoveries;⁴⁵ Equitas Ltd. had received those rights by assignment from Equitas Re,⁴⁶ and then assigned⁴⁷ them to Citibank as Trustee.

- (b) All such Assets at all times shall be maintained in the Trust Fund, separate and distinct from all other assets held by the institution acting from time to time as the trustee hereunder in any capacity. Such Assets or, in the case of Assets evidenced by book entry, depository receipts or the like, such records, instruments and writings as will enable the Trustee to negotiate such Assets as contemplated by Section 2(c) hereof, shall be continuously kept within the State of New York unless otherwise approved in writing by the Superintendent of Insurance of the State of New York.

NOTE: *cf.* LATD, §7.1. *et seq.*

- (c) The Grantor hereby represents and warrants that any Assets which are Eligible Securities and which are transferred by the Grantor to the Trustee for deposit in the Trust Fund will be in such form that the Beneficiary whenever necessary may, and the Trustee upon direction by the Beneficiary will be able to, negotiate any such Assets without consent or signature from the Grantor or any person in accordance with the terms of this Agreement.

NOTE: *cf.* LATD, §7.1 *et seq.*

- (d) The Grantor shall, from time to time hereafter as requested, execute assignments or endorsements in blank of all securities or other properties standing in the Grantor's name which are delivered to the Trustee to form a part of the Trust Fund so that, whenever necessary, the Trustee can negotiate any such Asset without the consent or signature of the Grantor or any other person. In addition, the Trustee may hold Assets of the Trust Fund in bearer form or in its own name or in the name of its nominee without adding words descriptive of its fiduciary capacity.
- (e) The Grantor shall promptly transfer to the Trustee, for deposit to the Trust Fund, any Reinsurance Funds and any other monies in respect of 1992 and Prior Business which is American Business which have been or will be assigned and/or transferred to the Grantor pursuant to the Reinsurance Agreement. The Trustee need not take any steps to collect any such funds, and the Trustee shall only be responsible for such funds actually received by it from the Grantor.

⁴³ See for example EATD, recital [10].

⁴⁴ EATD, §2(e).

⁴⁵ See EATD, eleventh and twelfth recitals; *ibid.*, §2(a), and *ibid.*, Exhibit A ("Assets deposited in the Trust Fund"). As to actual transfer of the relevant assets to the Equitas American Trust Fund, see for example: (1) September 3, 1996 collateral agreement between Equitas Ltd. and the Insurance Department of the State of New York; (2) undertaking agreement between the same parties, same date; (3) September 3, 1996 memorandum of waiver from New York Insurance Department to Equitas Ltd. under that collateral agreement, §6.1; (4) October 1996 agreement amending the September 3, 1996 collateral agreement; (5) September 4, 1996 custody agreement relating to charged account between Bankers Trust Company, Equitas Ltd. and the New York Insurance Department; (6) October 1996 custody agreement relating to charged account between the same parties.

⁴⁶ See RRC 5, §3.2 and assignment agreement, September 4, 1996, between Equitas Ltd. and Citibank, recital, §(C). For its part, Equitas Re had received the assigned rights from Equitas Re-reinsured SYA participants: see assignment agreement — financial recoveries, September 4, 1996, between AUA 9, the Relevant Names, the Corporation and AUA 10 (both as Managing Agent's Trustees), and Equitas Re, §2.1, "Subject to clause 2.3, each Relevant Name, acting through the Substitute Agent [AUA 9], hereby assigns to the Managing Agent's Trustees of the Relevant Name's relevant Premiums Trust Deed, with effect from the Effective Date, all of the right, title and interest of the Relevant Name in the proceeds and the right to receive proceeds (whether or not accrued) of all Financial Reinsurances." *Per ibid.*, §1.2, "Financial reinsurances means the benefit of the Reinsurance Agreements, including, without limitation, rights to rebate or return of premium thereunder, and any credit support, Security Interests or other rights granted in connection therewith, including, without limitation, the rights in relation to the Reinsurance Agreements listed in Column 4 of the Schedule[.]" *Per ibid.*, "Reinsurance Agreement means a reinsurance agreement entered into by or for the benefit of a Relevant Syndicate details of which are set out in the Schedule".

⁴⁷ See assignment agreement, September 4, 1996, between Equitas Ltd. and Citibank. *Ibid.*, §2: "Equitas [Ltd.] hereby assigns all its right, title and interest in the Assigned Rights to the EATD Trustee, such assignment to take effect immediately upon the Assigned Rights being assigned to Equitas". *Per ibid.*, recital, §(b), "Assigned Rights" means the rights in respect of the benefit of Financial Reinsurances (not defined) assigned to Equitas Ltd. by Equitas Re.

SECTION 3. Withdrawal of Assets from the Trust Fund.

- (a) The Beneficiary shall have the right, at any time and from time to time, to withdraw from the Trust Fund, upon written notice to the Trustee and the Grantor (the “Withdrawal Notice”), exclusively for the purposes set forth in Section 4, such Assets as are specified in the Withdrawal Notice. The Withdrawal Notice may designate a third party (the “Designee”) to whom Assets specified therein shall be delivered. The Beneficiary need present no statement or document in addition to a Withdrawal Notice in order to withdraw any Assets. For the purpose of this paragraph (a), the Beneficiary shall be deemed have provided the Grantor with a Withdrawal Notice where the Grantor or its Representative (as defined in the Lloyd’s American Trust Deed) initiates the withdrawal from the Trust Fund in its capacity as Agent under the Lloyd’s American Trust Deed.

NOTE: no EquitasRe-assured-at-Lloyd’s is entitled to payment under this clause, whether further to a judgment or arbitral award or otherwise (*cf.* LATD, §5.2; Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.3; Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §2.3), but only the Beneficiary as LATF trustee: see generally LATD, §4.1. The Beneficiary is protected under the LATD in relation to EATD withdrawals: see LATD, §4.2(F).

Withdrawal Notice: and see LATD, §1.30 and the LATD mentions of “Withdrawal Notice” there listed.

- (b) Upon receipt of a Withdrawal Notice, the Trustee shall immediately take any and all steps necessary to transfer the Assets specified in such Withdrawal Notice, and shall deliver such Assets to or for the account of the Beneficiary or such Designee as specified in such Withdrawal Notice.
- (c) Except as provided in Section 5 of this Agreement, in the absence of a Withdrawal Notice the Trustee shall allow no withdrawal of any Asset from the Trust Fund.

SECTION 4. Application of Assets.

- (a) Assets may be withdrawn from the Trust Fund under this Section 4 for the following purposes only:

- (i) to pay to, or for the account of, the Lloyd’s American Trust Fund of any Name, any portion of ERL’s Reinsurance Obligation in respect of American Business;

NOTE: this should be read with RRC 4, §3.4, especially *ibid.*, §(a). And see LATD, §4.1.

Lloyd’s American Trust Fund: see this book, Appendix 2.2. Each relevant EquitasRe-reinsured SYA participant’s LATF was not wound up at the time of R&R but remains live and liable to pay relevant liabilities. The principal question is how it is funded. Money was taken out of each relevant LATF and sequestered in the EATF. On the EATD Beneficiary’s / LATD’s Trustee’s demand, the EATF disgorges money to a relevant LATF. Thus are personal-use funds converted to common-use funds.

- (ii) to transfer to, or for the account of, the Lloyd’s American Trust Fund of any Name, in order to secure, and/or to pay, a Name’s several obligations (proportionate to the Name’s respective share of the obligations of the Name and one more other Names) arising with respect to any surety or other bonding arrangement in connection with litigation by a Policyholder of the Name, provided that such security and/or payment arises in respect of 1992 and Prior Business that is American Business;

NOTE: see LATD, §4.1(c)(iv).

- (iii) to transfer to, or for the account of, the Grantor, in order to secure, and/or to pay, the Grantor’s obligations, or any Name’s several obligations as described in subparagraph (ii) hereof, arising with respect to any surety or other bonding arrangement in connection with litigation by a Policyholder of a Name, provided that such security and/or payment arises in respect of 1992 and Prior Business that is American Business;

NOTE: this envisages that Equitas Re and or Equitas Ltd. will be personally required to furnish such a surety.

- (iv) to transfer to, or for the account of, the Lloyd’s American Trust Fund of any Name, in order to secure, and/or to pay the issuer of a letter of credit, any of a Name, several obligations (proportionate to the Name’s respective share of the obligations of the Name and one or more other Names) arising with respect to the issuance of a letter of credit in connection with a Policyholder of the Name, including reimbursement obligations and obligations to pay interest, fees, costs, expenses and indemnities, provided that such security and/or payment arises in respect of 1992 and Prior Business that is American Business;

NOTE: see LATD, §4.1(c)(iii) and (v).

- (v) to transfer to, or for the account of, the Grantor, in order to secure, and/or to pay the issuer of a letter of credit, any of the Grantor’s obligations, or any Name’s several obligations as described

in subparagraph (iv) hereof, arising with respect to the issuance of a letter of credit in connection with a Policyholder of a Name, including reimbursement obligations and obligations to pay interest, fees, costs, expenses and indemnities, provided that such security and/or payment arises in respect of 1992 and Prior Business that is American Business;

NOTE: see EATD, §4(a)(iv).

- (vi) to transfer to, or for the account of, the Lloyd's American Trust Fund of any Name, any amounts which are due and owing to the Name upon the completion of the Audit;
- (vii) to pay to EL, as Grantor, any amounts held in the Trust Fund that exceed 102% of the amount certified by the Grantor as the amount required to fund the entire Obligations; provided, that no amount shall be withdrawn for such purpose unless the Grantor shall have furnished the Beneficiary and the Trustee the prior written approval of the Superintendent of Insurance of the State of New York for such withdrawal. For the purposes of subparagraph (viii) of this paragraph (a), the phrase "the Trust Fund" in this subparagraph (vii) shall be deemed, where appropriate, to refer to the separate account established pursuant to subparagraph (viii); and

NOTE: cf. LATD, §4.1(E).

- (viii) where the Beneficiary has received a Termination Notice (as hereinafter defined) pursuant to Section 13 of this Agreement and the written approval of the Superintendent of Insurance of the State of New York referred to in Section 13(a) hereof, and where any of the Obligations remain unliquidated and undischarged ten days prior to the Termination Date (as hereinafter defined), to withdraw amounts equal to the sum of such obligations, and deposit such amounts in a separate account, apart from its other assets, in the name of the Beneficiary, in any bank or trust company organized in the United States, in trust for the uses and purposes specified in subparagraphs (i)-(vii) of this paragraph (a).

Termination Notice: defined at EATD, §13(b).

- (b) The Beneficiary may withdraw and apply any Asset withdrawn for the reasons set forth in paragraph (a) of this Section without diminution because of the insolvency of a Name or the Grantor. Assets withdrawn from the Trust Fund pursuant to Section 4(a)(ii), (iii), (iv), or (v) in order to provide security shall, to the extent reverting to the Grantor or the Beneficiary upon the termination, expiration or release from such security, be transferred by the Grantor or the Beneficiary, as the case may be, to the Trustee for deposit to the Trust Fund. The Trustee shall deposit to the Trust Fund such funds as it may receive from the Beneficiary as unapplied or returned funds in respect of 1992 and Prior Business that is American Business.

may withdraw and apply: this is of no concern to Equitas Policyholders Trustee in a RRC 7, §2.15 Insolvency Event because EATD assets are not RRC 4, §4.1 "Assigned Property" (see RRC 4, §4.2) or RRC 7, §1.1 "Trust Property".

without diminution because of the insolvency of ... the Grantor: the LATD trustee is under no EATD obligation to impose some *ad hoc* proportionate cover plan (for which LATD contains no provision) just because Equitas Re or Equitas Ltd. (each a EATD Grantor) happens to be insolvent.

- (c) The Trustee shall have no responsibility whatsoever to determine that any Assets withdrawn from the Trust Fund pursuant to Section 3 of this Agreement are used and applied in the manner contemplated by paragraph (a) or (b) of this Section 4. The Trustee shall further have no responsibility whatsoever to determine the amount of the Grantor's Obligations, or ERL's Reinsurance Obligation in respect of American Business, or EL's Retrocession Obligation in respect of American Business.

...

SECTION 6. Trust Fund Income. The Trustee shall collect all interest, dividends and other income in respect to Eligible Securities in the Trust Fund ("Income"). All Income (net of any expenses related thereto) shall be the property of the Trust Fund.

SECTION 7. Right to Vote Assets. The Trustee shall forward all annual and interim stockholder reports and all proxies and proxy materials relating to the Assets in the Trust Fund to the Grantor or the Investment Manager. The Grantor or the Investment Manager shall have the full and unqualified right to vote or instruct the Trustee how to vote any Assets in the Trust Fund.

SECTION 8. Additional Rights and Duties of the Beneficiary.

The Beneficiary shall be the beneficiary of the trust established hereby solely in its capacity as the American Trustee under the Lloyd's American Trust Deed and not in any personal capacity. In furtherance and not in limitation of the foregoing, any representation, warranty, covenant, agreement or other obligation or undertaking stated under this Trust Agreement to be made or undertaken by the American Trustee as Beneficiary is made by the American Trustee solely in its capacity as American Trustee and not in its individual capacity and recourse in respect of any such representation, warranty, covenant, obligation or undertaking shall be strictly limited to the assets from time to time in the relevant Lloyd's American Trust Fund and the American Trustee in its individual capacity shall have no obligation or liability hereunder and shall not be required to expend or risk its own funds or otherwise to incur any financial liability in the exercise of any rights or the performance of any duties hereunder. The foregoing sentences shall in no way reduce the responsibility of the Trustee hereunder for any acts or omissions to act hereunder. Nor shall the foregoing sentences reduce the responsibility of the Beneficiary as the American Trustee under the Lloyd's American Trust Deed for any acts or omissions to act thereunder.

| **NOTE:** see generally LATD, §10.2.

SECTION 9. Additional Rights and Duties of the Trustee.

...

- (f) The Trustee shall furnish to the Grantor, Lloyd's and the Beneficiary: (i) a statement of all Assets in the Trust Fund as of the inception of the Trust Fund and as of the end of each calendar quarter thereafter; (ii) a statement of income or loss of the Trust Fund following the completion of each calendar quarter after inception of the Trust Fund; (iii) such other information in respect of the Trust Fund in such format and detail and at such times as the Grantor, the Beneficiary or the Investment Manager may reasonably require, and the Trustee may reasonably obtain, in order to comply with reporting or disclosure requirements under any applicable law, regulation, rule, judgment or order; and (iv) such additional information in respect of the Trust Fund in such format and detail and at such times as the Grantor or the Beneficiary shall reasonably request and the Trustee may reasonably obtain. The written approval of any account of the Trustee by the Grantor and the Beneficiary shall be final, binding and conclusive upon all persons who may then or thereafter have any interest in the trust estate. The Trustee also at any time may render a judicial accounting of its proceedings. As used herein the term "account" shall mean and refer to the statements provided by the Trustee as hereinabove described and any other statement or accounts provided by the Trustee from time to time and shall not be limited to a formal account as may customarily be provided in connection with a trust. The Trustee shall in no event be required to account, or provide any information, to any Name or to any person other than the Grantor, the Beneficiary, the Investment Manager and the Superintendent of Insurance of the State of New York.

| **NOTE:** *cf.* LATD, §§8, 11.

| **Lloyd's:** not defined. Apparently the Corporation: *cf.* EATD, recital [5] and *ibid.*, §1 definitions of "Council".

| **approval:** see LATD, §16.4. See also EATD, §11(b).

- (g) Upon the request of the Grantor or the Beneficiary, the Trustee shall promptly permit the Grantor or the Beneficiary or their respective agents, employees or independent auditors to examine, audit, excerpt, transcribe and copy, during the Trustee's normal business hours, any books, documents, papers and records relating to the Trust Fund or the Assets. The Grantor shall provide the Trustee on a timely basis with any and all information, certifications, proofs and/or any other applicable documentation required under the Internal Revenue Code of 1986, as amended, and/or any other applicable law.

| **NOTE:** *cf.* LATD, §8.3.

- (h) The Trustee shall furnish to the Superintendent Insurance of the State of New York: (i) a statement of all Assets in the Trust Fund as of the inception of the Trust Fund and as of the end of each calendar quarter thereafter; (ii) a statement of income or loss of the Trust Fund following the completion of each calendar quarter after inception of the Trust Fund; and (iii) upon the request of the Superintendent, the Trustee shall promptly permit the Superintendent or his respective agents, employees or independent auditors to examine, audit, excerpt, transcribe and copy, during the Trustee's normal business hours, any books, documents, papers and records relating to the Trust Fund or the Assets.

- (i) The Trustee shall provide the Superintendent of Insurance of the State of New York with prompt written notice if and when the aggregate outgoings (for such purposes as described in Section 4(a) hereof) from the Trust Fund (net of the aggregate of any incomings to the Trust Fund and excluding investment transactions and any proceeds therefrom) equal or exceed \$400,000,000 in any single calendar month.

NOTE: see similarly LATD, §8.4.

- (j) The Trustee is authorized to follow and rely upon all instructions given by: (i) officers or employees named in incumbency certificates furnished to the Trustee from time to time by the Grantor, the Beneficiary, or the Investment Manager; or (ii) attorneys-in-fact acting under written authority furnished to the Trustee by the Grantor, the Beneficiary, or Investment Manager, including, without limitation, instructions given by letter, telephone, facsimile transmission, telegram, teletype, cablegram, electronic media or electronic access, if the Trustee believes such instructions to be genuine and to have been signed, sent or presented by the proper party or parties and if, in the case of instructions given by electronic access, such instructions are accompanied by code words furnished by: (i) the Trustee, (ii) the Grantor or the Beneficiary by means of the use of the electronic access terminal device or (iii) the Investment Manager by means of the use of the electronic access terminal device; provided, however, that the Trustee has not been directed by the Grantor, the Beneficiary, or the Investment Manager, as applicable, or by such person or persons not to recognize such code words. The Trustee shall not incur any liability in executing such instructions: (i) from any attorney-in-fact prior to receipt by the Trustee of notice of the revocation of the written authority of the attorney-in-fact; or (ii) from any officer of the Grantor, the Beneficiary, or the Investment Manager named in an incumbency certificate delivered hereunder prior to receipt by the Trustee of a more current certificate.

...

- (p) Whenever in the administration of the Trust Fund created by this Trust Agreement the Trustee shall deem it necessary to or desirable that a matter be proved or established prior to taking, suffering or omitting any action thereunder, such matter (unless other evidence in respect thereof be herein specifically prescribed) may be deemed to be conclusively proved and established by a statement or certificate signed by or on behalf of the Grantor or the Beneficiary or the Investment Manager and delivered to the Trustee and said statement or certificate shall be full warrant to the Trustee for any action taken, suffered or omitted by it on the faith thereof; but in its discretion, the Trustee may, in lieu thereof, accept other evidence of the fact or matter or may require such other or additional evidence as it may deem reasonable.

NOTE: see LATD, §16.5.

- (q) Except as otherwise expressly provided in this Trust Agreement, any statement, instruction, certificate, notice, request, consent, approval, or other instrument to be delivered or furnished by the Grantor or the Beneficiary or the Investment Manager shall be sufficiently executed if executed in the name of the Grantor or the Beneficiary or the Investment Manager by such officer or officers of the Grantor or the Beneficiary or the Investment Manager or by such other agent or agents of the Grantor or the Beneficiary or the Investment Manager as may be designated in a resolution or letter of advice by the Grantor or Beneficiary or the Investment Manager. Written notice of such designation by the Grantor or the Beneficiary or the Investment Manager shall be filed with the Trustee. The Trustee shall be protected in acting upon any written statement or other instrument made by such officer or agent (or purported officer or agent) of the Grantor or the Beneficiary or the Investment Manager with respect to the authority conferred therein.

approval: see generally LATD, §16.

...

- (u) The Trustee shall have no responsibility whatsoever to determine whether the Assets are sufficient to secure the Obligations.
- (v) Whenever the Trustee is authorized or required to take action at the order, instruction, request or direction or with the consent or approval of the Grantor or to provide notice or other information to the Grantor, the Trustee shall be fully protected in relying upon any authorization, order, instruction, request, direction, consent, approval, notification or information furnished by or to either Grantor.

approval: see generally LATD, §16.

...

SECTION 12. Inadequacy of the Trust Fund.

NOTE: *cf.* similar provisions at (for example) LATD, §18; Lloyd's US Surplus-Lines Common-Use Trust Deed, 4.1 *et seq.*; Lloyd's Credit-for-Reinsurance Common-Use Trust Deed, §4.1 *et seq.*

(a) The Trust Fund shall be deemed inadequate if:

inadequate: *viz.*, generally inadequate, not inadequate for any one particular payment.

- (1) any order is made by any competent court, or resolution passed, for the winding up of ERL, or a provisional liquidator is appointed in respect of ERL;

NOTE: see generally RRC 4, Sch. 3, §§2.3(a), 2.3(b), 8.1, 10.1, etc.⁴⁸ And see the other relevant insolvency processes at EATD, §12(a)(3).

- (2) ERL is unable or deemed unable to pay its debts within the meaning of Section 123 of the Insolvency Act (U.K.) 1986 or becomes unable to pay its debts as they fall due or suspends or threatens to suspend making payments (whether of principal or interest) with respect to all or any class of its debts; provided that in determining whether ERL is unable to pay its debts as aforesaid, account shall be taken of the extent to which any debt which ERL would otherwise be obliged to pay in full can be paid at less than that amount under: (a) any "proportionate cover" plan then in effect; (b) any "proportionate cover" plan which ERL has power to introduce (unless ERL shall have stated that no "Proportionate Cover" plan will be introduced to enable to pay its debts); or (c) any suspension of payments introduced pursuant to Paragraph 9 of Schedule 3 to the Reinsurance Agreement;

NOTE: see similarly RRC 7, §2.15(c). But see EATD, §12(a)(4).

Section 123 of the Insolvency Act (U.K.) 1986: Insolvency Act 1986, s.123 is quoted in full elsewhere.⁴⁹

threatens to suspend making payments: see for example RRC 4, Sch. 3, §§2,4 9.

"proportionate cover": see generally RRC 4, §3.5 and *ibid.*, Sch. 3. EATD's reference to RRC 4 is inappropriate for one of the "Grantor", Equitas Ltd., which has its own, separate proportionate cover: see RRC 5, §2.4 and *ibid.*, Sch. 3. Equitas Re and Equitas Ltd. have undertaken to inform the New York Insurance Department in writing if either of their boards proposes to invoke proportionate cover,⁵⁰ to consult with the Department if practicable under the circumstances,⁵¹ and to allow the Department to examine either company's books and records.⁵²

plan: there appears to be a distinction between Equitas Re using (per RRC 4, Sch. 3, §3.1 *et seq.*) a Proportionate Cover Rate and Equitas Re implementing (under *ibid.*, Sch. 3, §5) a Proportionate Cover Plan: see RRC 4, Sch. 2, §1 definition of "Proportionate Cover Plan" and "Proportionate Cover Rate".

"Proportionate Cover": the upper case appears to be insignificant.

any suspension of payments: a liberal protection.

- (3) an administrator, administrative receiver or manager, receiver, trustee or similar officer is appointed or an administration order made with respect to ERL or the whole or any substantial part of its assets; or

NOTE: see generally RRC 4, Sch. 3, §8.1, 11, etc.⁵³ And see the other relevant insolvency processes at EATD, §12(a)(1).

- (4)
 - (a) the Grantor invokes the "proportionate cover" provisions of the Reinsurance Agreement, and the "proportionate cover" rate on American Business is less than 100%; and
 - (b) in such case, only if the claim of any Policyholder which has satisfied all of the conditions set forth in paragraph 5.2 of the Lloyd's American Trust Deed has not been satisfied

⁴⁸ On liquidation, see p.230.

⁴⁹ See p.A217.

⁵⁰ September 3, 1996 letter on Equitas Holdings letterpaper from Equitas Re to New York Insurance Department's Assistant Deputy Superintendent Chief, Financial Condition Property/Casualty Bureau.

⁵¹ September 3, 1996 letter on Equitas Holdings letterpaper from Equitas Re to New York Insurance Department's Assistant Deputy Superintendent Chief, Financial Condition Property/Casualty Bureau.

⁵² September 3, 1996 letter on Equitas Holdings letterpaper from Equitas Re to New York Insurance Department's Assistant Deputy Superintendent Chief, Financial Condition Property/Casualty Bureau.

⁵³ On administration, see p.229.

within one hundred and twenty (120) days of the expiration of the period in paragraph 5.2(D) of the Lloyd's American Trust Deed.

NOTE: *cf.* EATD, §12(a)(1).

“proportionate cover” provisions of the Reinsurance Agreement: see RRC 4, §3.5 and *ibid.*, Sch. 3.

“proportionate cover” rate on American Business: *viz.*, presumably, the RRC 4, Sch. 3, §6.1(a)(ii) “US Trust Rate”.

is less than 100%: the purpose of proportionate cover is that it cannot be more and always will be less than 100%: see for example RRC 4, Sch. 3, §3.1(i) etc.

only if the claim ...: Equitas Re's or Equitas Ltd.'s mere declaration of proportionate cover (RRC 4, Sch. 3 §5.1 *et seq.* and RRC 5, Sch. 3, §5.1 *et seq.* respectively) is not “inadequacy” without the LATD, §5.2(D) 120 day default.

any Policyholder: the EATD is deemed inadequate in relation to all relevant claims by Equitas Re's or Equitas Ltd.'s relevant default in relation to any one relevant claim (*cf.* “insolvency” under the Lloyd's US Surplus-Lines Common-Use Trust Fund (at *ibid.*, §4.1) and the Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund (at *ibid.*, §4.1).

has not been satisfied: *viz.*, apparently, satisfied in the context of EATD, §12(a)(4)(a), *viz.*, 100% of whatever Equitas Re has determined is the RRC 4, Sch. 3, §6.1(a)(ii) rate at which it will discharge its relevant RRC 4, §3 liability, not 100% of the latter liability. It is presumably in the Council's power to use its Lloyd's Act 1911, s.7(b)-(d) discretions to pay over some Corporation personal assets as a float to enable Equitas Re to pay a LATD, §5.2 qualifying claim.

- (b) In the event that the Trustee receives notice that any of the events specified in Section 12(a)(1)-(4) above have occurred, the Trustee shall immediately transmit a written notice of such event to the Superintendent of Insurance of the State of New York.

NOTE: see similarly LATD, §18.2.

New York: pre-eminently among US state insurance regulators in relation to the Lloyd's enterprise, the Superintendent of Insurance of the State of New York has various express functions in relation to the EATD including approval to Trustee moving assets out of New York;⁵⁴ approval for Trustee to pay to Equitas Ltd. certain trust surplus;⁵⁵ approval for Trustee to deposit trust assets in a separate account;⁵⁶ determining collateral used by the Trustee in securities lending transactions;⁵⁷ allusion to the Trustee's obligation to account to him;⁵⁸ the recipient of various statements etc. from the Trustee;⁵⁹ his right to examine Equitas Ltd.'s books;⁶⁰ the recipient of notice if Trust aggregate outgoings equal or exceed \$400m in any one calendar month;⁶¹ the recipient of notice of the Trustee resigning, and allusion to his power to remove the Trustee;⁶² the recipient of EATD, §12(a)(1)-(4)(a) events;⁶³ his power to seek a court order per New York Insurance Law, Art. 74;⁶⁴ his consequential obligations in relation to holding trust assets;⁶⁵ approval of the EATD's termination;⁶⁶ recipient of notice from the Trustee of the EATD's termination;⁶⁷ approval for EATD amendments.⁶⁸ The Superintendent has publicly indicated sensitivities surrounding R&R including the dependence of various New York entities on insurance bought at Lloyd's.⁶⁹

54 EATD, §2(b).

55 EATD, §4(a)(vii).

56 EATD, §4(a)(viii).

57 EATD, §5(g).

58 EATD, §9(f).

59 EATD, §9(h).

60 EATD, §9(h).

61 EATD, §9(i).

62 EATD, §11(a).

63 EATD, §12(a)(4)(b).

64 EATD, §12(a)(4)(c).

65 EATD, §12(a)(4)(d).

66 EATD, §13(a).

67 EATD, 613(b).

68 EATD, §18.

69 See for example Commissioner Ed Muhl, Superintendent of Insurance, New York State Insurance Department, *New York Law School Center for International Law Symposium — Implications of the Reconstruction of Lloyd's of London*, November 6, 1996 (found at www.nyls.edu/CIL/lloyds.htm, July 25, 2001), p.3-6 of 28:-

I was [early January 1995] handed a report and it was the department's review of the adequacy of the Lloyd's of London U.S. trust fund. Along with this report was an order that the insurance department counsel had put together. If I had signed that order, it would have de-accredited Lloyd's of London as an accredited reinsurer and an accredited excess and surplus lines [insurer] ... in New York, basically for their failure to maintain adequate monies in trust.

... New York is basically a port of entry of Lloyd's for the United States because we oversee all the U.S. trusts. We also control its status as an eligible writer in the United States market as well as in the excess and surplus lines. I asked my senior management if they realized what would happen if I signed the order, The general answer was very simply that Lloyd's would be de-accredited. I responded by saying, “If I sign this order, the insurance world as we know it would change.”

- (c) In the event that the Trust Fund becomes inadequate as specified in Section 12(a), then notwithstanding any other provision in this Trust Agreement, grounds shall be deemed to exist for the Su-

I then asked my staff how many New York license companies had the bulk of their reinsurance recoverables through Lloyd's, and how many countrywide. The answer was that New York had fifty-one companies and countrywide we figured about 300 companies. So if I sign that order, Lloyd's and its reconstruction effort at the time would have failed and we would have fifty-one insolvent New York insurance companies and, at a minimum, 300 insolvencies countrywide. All U.S. major airports, including the likes of Kennedy, Newark and La Guardia, would have no coverage or recoverables because they insured directly in the E and S market through Lloyd's. Furthermore, the New York Port Authority and the Long Island Railroad would be without recoverables and insurance on the direct basis due to a possible lack of capacity in this industry if Lloyd's were to fail. This had the potential to be the most cataclysmic event that the insurance world had ever seen. ...

We set out to find a solution to this monumental problem because we did not like the alternatives. If we were to pull the plug, capacity would dry up for at least two years, prices would skyrocket across the board, and how do you deal with 300 insolvencies of primary insurers all at the same time? Our primary responsibility, however, was to protect U. S. policyholders' interest. Lloyd's American Trust Funds are there because New York State Insurance Department requires Lloyd's to put up in each of these trusts \$ 100 million for the excess and surplus lines, and another \$ 100 million for reinsurance. In addition, we require Lloyd's to put up dollar-for-dollar on all U.S. liabilities on a gross basis whatever they insure. We examined the trust and found \$13 billion to be in trust. That is a little bit shy of what they were supposed to have at the time, shy by about \$7 billion net. I elected to immediately stop the bleeding by requiring Lloyd's to create two new trusts and to fully fund these trusts on a dollar-for-dollar gross basis on all U.S. business written from that point forward. So we were able to stop the problem from escalating. We then set out to deal with the problems of the past.

We worked with Lloyd's on their new company, later called the Equitas project, which was simply a mechanism to marshal assets and to pay claims of policyholders, including U.S. policyholders. As the domiciliary regulator of LATF, Lloyd's American Trust Fund, the New York Insurance Department was required to approve any transfer of funds from LATF to fund Equitas. We wanted to achieve several objectives. The primary one, as I mentioned before, was to protect U. S. policyholders' interest. Another objective was to represent the other forty nine state regulators in this effort. Yet another objective was to make the Equitas project work.

The negotiations we entered into were very intense and at times were quite sensitive. Prior to approving the partial transfer of monies, we required the incorporation of a number of safeguards, including an additional \$1.2 billion, basically \$800 million in cash and \$400 million collateralized guarantees, to be contributed to the Equitas trust to support solely U.S. dollar denominated liabilities. We are very proud of the work that we did.... Our efforts resulted in the reconstruction effort going forward with what we believe is a stronger Lloyd's of London-well positioned to compete both in the worldwide reinsurance market as well as in the surplus lines markets. The Equitas project-itself, although not perfect, represents the best solution to a difficult process. Equitas, in my opinion, is the best chance for U.S. policyholders to receive full payment on all their claim activity.

But there are lessons to be learned from these extraordinary events. In fashioning answers to difficult problems we kept asking ourselves, how did these problems escalate to the point where we were at the brink of a serious solvency issue? How did Lloyd's basically fall prey to these difficulties? In hindsight we find that it was a combination of several significant factors. Not the least of which was complacency, and incompetence in some cases. Then there was retro-liability involving asbestos and environmental claims in the United States and natural disasters such as Hurricanes Andrew and Hugo and the Northridge quake. These were coupled with the losses at Piper Alfa and the Valdez oil spill. Finally, there was the reinsurance ceding amongst themselves without adequate information and without knowing that the Names were reinsuring themselves in many instances.

One of the most significant issues revealed to our staff during the investigative review process was a problem with the process that actually made Lloyd's so unique in the first instance. This was their usual but actually unusual accounting process, or maybe I should say their lack of accounting. In fact, some of the syndicates actually did not know what their exposures were. We must remember that Lloyd's has a long and proud history. It is an institution steeped in its origins and its traditions. An underwriter in the 17th or 18th century would be very comfortable with Lloyd's in the 1990s because not much had changed over that period. But insurance and reinsurance transactions have become substantial and complex and require a greater degree of sophistication in monitoring, in measuring, and in general information processing. Many of the Lloyd's syndicates lack the sophistication which resulted in the escalation of many of their problems. Fortunately, Lloyd's has now come into the modern age and is now using computers. The New York Insurance Department is also requiring Lloyd's to file individual quarterly and annual financial statements every syndicate writing either reinsurance or excess in surplus lines. We are requiring separate trust funds for each syndicate writing U.S. risks. We are also requiring syndicates to separate their reinsurance business from their excess lines business and to file statements reflecting their experience in each market.

These requirements have added a crucial element of accountability and transparency that was missing in the past. It is important to create a system of checks and balances to determine whether the process is working as intended. It is also important for the underwriters to use all of their skills in assessing the risk exposure and pricing it properly. They cannot afford to use unskilled or ill-prepared individuals in this very critical role. The management has a responsibility to test the system to determine compliance with policy and good insurance practice and not become complacent with process or tradition. It is important for Lloyd's and Lloyd's syndicates, particularly for their credibility, to make their accounting systems even more transparent. We believe that it is important for Lloyd's to abandon their traditional three-year accounting in favor of a one-year approach. Such a move will make it easier for customers, investors, analysts and regulators to assess the financial strengths and weaknesses of the organization. Their problems can be identified earlier and hopefully the misdeeds of the past will not be recreated.

Lloyd's has over the years prided itself on being self-regulated. The DTI conducts solvency tests and provides some overall regulation through a very talented and very dedicated staff. The DTI, though, does not examine Lloyd's itself or its syndicates, and this has the potential of creating a very large credibility problem. ... The new Lloyd's is now positioned for significant market rebound in my opinion, and its importance to the U.S. market and its significance to the world of insurance generally is quite great. I have come to understand how small our world really is because we are dealing in a global insurance marketplace and there is an absolute interdependence of the players within that market.

perintendent of Insurance of the State of New York to obtain from a court of competent jurisdiction an order that, in accordance with Article 74 of the New York Insurance Law, directs the Trustee to transfer to the Superintendent of Insurance of the State of New York all of the assets of the Trust Fund. Compliance with such an order shall relieve the Trustee of all further duties, obligations and liabilities of any kind or description under this Trust Agreement. Nothing in this paragraph shall be construed as relieving the Trustee of any liability under this Trust Agreement for any acts or omissions which occurred prior to the date on which the Trustee transfers the assets of the Trust Fund to the Superintendent of Insurance of the State of New York.

NOTE: *per* RRC 4, §3.8, Equitas Re's performance of a relevant RRC 4, §3 obligations is suspended pending such seizure,⁷⁰ and is to be treated as discharged to the extent that the seized assets are used to discharge it.⁷¹

Article 74: Article 74 specifically mentions the Lloyd's enterprise.⁷² There are similar seizure provisions at LATD, §18.3, Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.4, and Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.4.

- (d) If the assets of the Trust Fund have been transferred to the Superintendent of Insurance of the State of New York pursuant to Section 12(c), such assets shall be applied in accordance with the laws of the State of New York applicable to the conservation of insurance companies. If the Superintendent of Insurance of the State of New York determines that the assets of the Trust Fund or any part thereof are not necessary to satisfy the Obligations in respect of American Business, such assets or part thereof shall be transferred by Superintendent of Insurance of the State of New York to EL.

NOTE: there are similar distribution obligations at LATD, §18.4, Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.5 and Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.5. Equitas Re's RRC 4, §3 obligation is deemed discharged to the extent that an EquitasRe-assured-at-Lloyd's is paid by the NYID: RRC 4, §3.8(b).

SECTION 13. Termination of the Trust Fund.

- (a) The Trust Fund and this Agreement may be terminated only after (i) the Grantor or the Beneficiary has given the Trustee written notice of its intention to terminate the Trust Fund (the "Notice of Intention"), which shall be accompanied by a written certification by the Grantor as to the Obligations as of the date of termination and a report of one more firms of independent actuaries as to the amount of the Obligations as of the date set forth in such report, which date shall be within ninety (90) days of the proposed date of termination, (ii) the Trustee has given the Grantor and the Beneficiary the written notice specified in paragraph (b) of this Section 13, and (iii) the Grantor has provided the Beneficiary, or, in the case of termination by the Beneficiary, the Beneficiary has provided the Grantor, with the prior written approval of the Superintendent of Insurance of the State of New York. The Notice of Intention shall specify the date on which the notifying Party intends the Trust Fund to terminate (the "Proposed Date").
- (b) within three business days following receipt by the Trustee of the Notice of Intention and the certification and report referred to in clause (i) of Section 13(a) hereof, the Trustee shall give written notification (the "Termination Notice") to the Beneficiary, the Grantor and the Superintendent of Insurance of the State of New York of the date (the "Termination Date") on which the Trust Fund shall, subject to receipt of the approval referred to in clause (iii) of Section 13 (a) hereof, terminate. The Termination Date shall be (a) the proposed date if the proposed date is at least 30 days but no more than 45 days subsequent to the date the Termination Notice is given; (b) 30 days subsequent to the date the Termination Notice is given, if the proposed date is fewer than 30 days subsequent to the date the Termination Notice is given; or (c) 45 days subsequent to the date the Termination Notice is given, if the proposed date is more than 45 days subsequent to the date Termination Notice is given.

⁷⁰ RRC 4, §3.8(a).

⁷¹ RRC 4, §3.8(b).

⁷² S. 7402. Grounds for rehabilitation of domestic insurer:-

The superintendent may apply under this article for an order directing him to rehabilitate a domestic insurer which: (a) Is insolvent within the meaning of section one thousand three hundred nine of this chapter. (b) Has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the superintendent, his deputy or examiner. (c) Has failed or refused to comply, within the time designated by the superintendent, with an order of the superintendent, pursuant to law, to make good an impairment of its capital, or minimum surplus to policyholders, if a stock insurer, or of its minimum surplus, if a mutual insurer, a reciprocal insurer, Lloyds underwriters or a co-operative fire insurance corporation.

- (c) On the Termination Date, upon receipt of written approval of the Beneficiary, the Trustee shall transfer to EL, as Grantor, any Assets remaining in the Trust Fund, at which time all liability of the Trustee with respect to the Assets shall cease. The Trustee shall be entitled to a release upon rendering a final accounting of the Trust Fund in accordance with Section 9(f) hereof.

| **NOTE:** see LATD, §16.2 etc.

SECTION 14. Governing Law. The provisions of and validity and construction of this Agreement shall be governed and construed in accordance with the laws of the State of New York, without regard to the conflicts of laws principles thereof.

| **NOTE:** see similarly LATD, §19.1; Lloyd's US Surplus-Lines Common-Use Trust Deed, §5.1; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §5.1.

SECTION 15. Successors and Assigns. No Party may assign this Agreement or any of its rights or obligations hereunder, whether by merger, consolidation, sale of all or substantially all of its assets, liquidation, dissolution or otherwise, except as expressly permitted by Section 11 of this Agreement.

SECTION 16. Severability. In the event that any provision of this Agreement shall be declared invalid or unenforceable by any regulatory body or court having jurisdiction, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining portions of this Agreement.

| **NOTE:** see similarly Lloyd's US Surplus-Lines Common-Use Trust Deed §5.6; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §5.6. Apparently no equivalent in LATD.

SECTION 17. Entire Agreement. This Agreement constitutes the entire agreement among the Parties, and there are no understandings, agreements, conditions or qualifications relative to this Agreement which are not fully expressed in this Agreement. This Agreement is not intended to confer on any person other than the Parties and their respective successors any rights or benefits.

SECTION 18. Amendments. This Agreement may be modified or otherwise amended, and the observance of any term of this Agreement may be waived, only if such modification, amendment or waiver is: (a) in writing and signed by the Parties; and (b) has the prior written approval of the Superintendent of Insurance of the State of New York.

| **NOTE:** see LATD, §16.3.

...

Appendix 2.2

Lloyd's American Trust Deed (LATD)

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INTRODUCTORY NOTE

eligible claims; personal-use fund

- p.1** The LATF is available direct to the assured-at-Lloyd's to discharge relevant LATD liabilities, viz. liabilities arising under a relevant insurance contract where both the premium is payable in US dollars and the claim is expressed in US dollars, regardless of the location of the assured-at-Lloyd's or of the risk — the LATD calls such insurance, illogically, “American business”.¹ Each “Name”² has his own LATF: the LATF is a personal-use fund.³ His LATF⁴ is available to pay relevant claims only⁵ against him. Because each SYA participant is deemed to enter into his own insurance contract with the assured-at-Lloyd's (the SYA-level separate contracts rule), and because his liability on that contract is several (Lloyd's Act 1982, s.8(1)), the assured's-at-Lloyd's recourse⁶ to any one LATF is likely to be insignificant. In practice, the EquitasRe-assured's-at-Lloyd's claim against each relevant liable EquitasRe-reinsured SYA participant will be aggregated with that against (as appropriate⁷) the latter's co-defendants or co-judgment-debtors.

¹ See LATD, §1.3. Other claims securitisation trust deeds take a geographical approach: see for example

² See for example LATD, recital 1 (“each Underwriting Member”).

³ Cf. common-use funds such as the Central Fund; Lloyd's US Surplus-Lines Common-Use Trust Fund; Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund.

⁴ See for example *In re Lloyd's American Trust Fund Litig.*, 954 F. Supp. 656 (S.D.N.Y. 1997).

⁵ On euphemistically named “inter-availability” — viz., using one SYA participant's LATF to pay another SYA participant's LATD obligations — see for example *NYID Report 1995*, p.12-13:-

The examination also determined that in instances where a claim is required to be paid from LATF and there are insufficient funds in a particular group account, Lloyd's instructs Citibank to draw down on a pool of funds held in certain other group accounts, regardless of whether or not these group accounts are under the control of the same Managing Agent and despite the fact that a Name's funds that are drawn on may have no liability for the claim, in order to ensure that the claim is settled. In effect, Lloyd's borrows one Name's assets to pay for another Name's liabilities.

See *In re Lloyd's American Trust Fund Litig.*, 954 F. Supp. 656 (S.D.N.Y. 1997). And see *People of the State of California v Lloyd's etc.*, February 21, 1996 complaint, §5(h) and (i) (p.4-5):-

[P]remium monies deposited in Lloyd's American Trust Deeds, purportedly held in trust accounts at Citibank in New York, were and are so thoroughly commingled that there is no way to account for the ownership or allocation of said funds, despite representations that said funds would be maintained in segregated accounts; (i) ... Lloyds has used monies held in the Premium Trust Accounts at Citibank in New York to pay for other and additional expenses without the authorization or consent of the California investors; (j) ... the diversion of monies held in the Lloyd's Premium Trust Accounts at Citibank in New York had the effect of imposing joint and several liability on the California investors without their authorization or consent....

⁶ See generally LATD, §5.2.

⁷ See LATD, §5.2(a), requiring a judgment against either the SYA participant or the “Syndicate”.

funding from EATD; applications

- p.2 In RRC 4, §5.1(d), every relevant EquitasRe-reinsured SYA participant assigns to Equitas Re, as partial RRC 4, §5 consideration for Equitas Re's discharge by payment of its *ibid.*, §3 reinsurance obligations, all right, title, benefit and interest which he has or may have in his LATF insofar as that right, title benefit or interest arises in respect of 1992 and Prior Business. The standard-form LATD is integrated into the EATD: see for example LATD, §16. The EATD provides that "Assets" may be withdrawn from the EATF: (1) only by Citibank in its capacity of trustee of the LATFs ("Beneficiary"⁸).⁹ For administrative convenience the EATF Beneficiary (also for administrative convenience the LATFs' trustee) and the EATF Trustee were originally the same person; the EATF Trustee has recently changed;¹⁰ (2) on the Trustee giving itself, Equitas Re and Equitas Ltd. a written "Withdrawal Notice";¹¹ (3) solely for specified purposes.¹² When Citibank as Trustee receives a Withdrawal Notice from the EATD Beneficiary, it must "immediately" take steps necessary to deliver the specified Assets to or for the account of the Beneficiary.¹³ Once funded from the EATF, permitted LATD applications include (for example¹⁴): (1) putting the appropriate LATF in funds so that it can discharge the EquitasRe-reinsured SYA participant's liability for relevant American Business¹⁵ or that participant's liability to post a pre-answer bond in relevant claims litigation;¹⁶ (2) paying Equitas Ltd. the amount by which the trust fund exceeds 102% of the amount certified as being required to fund the entire "Obligations" (as defined¹⁷).

inadequacy of trust fund assets: generally and Equitas Re

- p.3 All relevant LATFs simultaneously become "inadequate"¹⁸ if either: (1) the DTI has ordered the Lloyd's market to cease trading;¹⁹ (2) Equitas Re adopts a Proportionate Cover Plan,²⁰ the Proportionate Cover Rate on claims arising from "American business" is less than 100%,²¹ and the Policyholder's claim has not been satisfied within one hundred and twenty days of the thirty-day waiting period.²² On receiving notice from the DTI or Equitas Re, as appropriate, the American Trustee must immediately notify the Superintendent of Insurance of the State of New York in writing,²³ who then has grounds to obtain a court order directing the LATF Trustee to transfer all trust assets — except those over which it has a lien — to the Superintendent,²⁴ to be applied under New York law relating to the conservation of insurance companies.²⁵

⁸ EATD, title page.

⁹ EATD, §3(a).

¹⁰ See p.A172.

¹¹ EATD, §3(a)-(c).

¹² EATD, §3(a).

¹³ EATD, §3(b).

¹⁴ See the full list at EATD, §4.

¹⁵ EATD, §4(a)(i).

¹⁶ EATD, §4(a)(ii); and see *ibid.*, §(iii).

¹⁷ See EATD, §1 for the full and extensive definition. "Obligations" includes relevant losses paid by the SYA participant and not recovered from Equitas Re or Equitas Ltd. Equitas Re and Equitas Ltd. are required to calculate "Obligations" in accordance with UK solvency accounting principles: *ibid.* And see *ibid.*, §§4(a)(viii) and 13.

¹⁸ See generally LATD, §18.

¹⁹ LATD, §18.1(a).

²⁰ LATD, §18.1(b)(i).

²¹ LATD, §18.1(b)(ii).

²² LATD, §18.(b)(iii). On the standard waiting period, see *ibid.*, §5.2(D).

²³ LATD, §18.2.

²⁴ LATD, §18.3, mentioning New York Insurance Law, Article 74.

²⁵ LATD, §18.4. Any surplus assets are then transferred back to the American Trustee to pay the latter's remuneration (on which see *ibid.*, §13), and any surplus thereafter must be transferred by the American trustee to the Name's PTF: *ibid.*

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AMENDMENT AND RESTATEMENT

LLOYD'S AMERICAN TRUST DEED

[There appears to be only one version of the LATD. The renderings of LATD seen by the Publisher do not have version numbers and appear to be identical in content.]

WHEREAS:

1. This Instrument (hereinafter called the "Lloyd's American Trust Deed") sets forth certain of the terms and provisions governing the American business of each Underwriting Member of the Society of Lloyd's (hereinafter called the "Name").

NOTE: and see the duplicative definition at LATD, §1.16.

¹ Editorially added.

certain of the terms: the course of insurance business at Lloyd's is characterised by the absence in one place of all relevant governing terms. The Lloyd's policy is particularly incomplete.² LATD particularly does not allude to the availability of any other relevant personal-use or common-use fund.

each: see the relevant annotation to LATD, recital 2.

Underwriting Member: the distinction is pertinent (*cf.* not underwriting and non-underwriting Members) but misleading: not every SYA participant will necessarily have "American business".

Society of Lloyd's: there is no such entity.³ The Corporation is meant.

2. The parties under the Lloyd's American Trust Deed shall be the Name, the Agent or Agents through which the Name underwrites (hereinafter called the "Agent"), the Trustee hereunder acting from time to time (hereinafter called the "American Trustee") and the Society of Lloyd's (hereinafter called "Lloyd's").

the Name: *viz.*, only one particular Name and only his relevant liabilities. The singularity of SYA participant participation is characteristic of a personal-use fund deed. *Cf.* the entirely different configuration of common-use fund deeds: see for example Lloyd's US Surplus-Lines Common-Use Trust Deed, heading. An LATF being a personal-use fund, each relevant SYA participant has his own LATF. Lloyd's Act 1982, s.8(1) implicitly governs. Assets in the LATF are available to pay only his own relevant liabilities. *Cf.* the entirely different liability, funding and paying dynamics of a common-use fund, where the equivalent term is "Underwriters": see for example Lloyd's US Surplus-Lines Common-Use Trust Deed, recital [1] (*cf.* for example EATD, recital [3]).

Society of Lloyd's: see relevant annotation to LATD, recital 1.

3. The form of the Lloyd's American Trust Deed was originally adopted on August 26, 1939 and has heretofore been amended by various instruments dated October 31, 1947, January 14, 1948, October 2, 1963 and September 22, 1982, all such amendments being made by the Committee, the then governing body of Lloyd's, and has been further amended by instruments dated April 7, 1989, December 9, 1993, July 31, 1995, December 21, 1995 and September 3, 1996 made pursuant to resolution of the Council, the present governing body of Lloyd's.
4. The Council, the present governing body of Lloyd's, by resolution dated January 7, 1998, hereby exercises its power to amend the trusts and provisions of the Lloyd's American Trust Deed in the manner set forth herein. The Lloyd's American Trust Deed as so amended shall constitute the American Instrument and shall also constitute an Overseas Direction of the Council as those terms are defined in the Lloyd's Premiums Trust Deed approved pursuant to the Insurance Companies Act (U.K.) 1982 for insurance business at Lloyd's other than long term business (hereinafter called the "Premiums Trust Deed").
5. The Lloyd's American Trust Deed as so amended is hereby restated in its entirety.

NOW, THEREFORE, it has been agreed that the Lloyd's American Trust Fund (as hereinafter defined) shall be held upon the following trusts and provisions:

ARTICLE 1

DEFINITIONS

The terms defined in this Article shall, unless the context otherwise requires, have the following meanings:

- 1.1 "1992 and Prior Business" means any liabilities under contracts of insurance (whether direct or otherwise) or reinsurance underwritten at Lloyd's (other than long term business as defined from time to time by the Insurance Companies Act (U.K.) 1982 or by a later similar statute) and originally allocated to the 1992 Year of Account or any earlier Year of Account including, without limitation, any such liabilities reinsured to close into the 1993 or any later Year of Account but excluding any liabilities re-signed, or reallocated pursuant to a premium transfer, into the 1993 or later Year of Account.

NOTE: for LATD use, see for example *ibid.*, §1.2(B), 1.5, 1.25(b), 4.2(A), (C), (D). *Cf.* use of the same term in RRC 4 and EATD.

² See p.104.

³ See p.184.

any liabilities: the LATF being a personal-use fund, the liabilities are only those of the LATF “name”, not — *cf.* common-use funds — those of all SYA participants liable on the particular claim.

the 1992 Year of Account: error: there is no such thing as “the” year of account: “the participants on a YA budding in the 1992 UY” is presumably meant. In using “the”, the draftsman appears to be confusing SYAs with UYs.

1.2 “Agent” means:

NOTE: for this deed’s use of “Agent” *simpliciter*, see for example *ibid.*, recital 2; *ibid.*, §§1.16, 1.26, 1.27, 3.2, 4.1(B)(ii), (iii)(a), (D), (E), 4.2(A), (B), (C), (D), 4.4, 5.3, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.7, 7.8, 7.9, 9.1, 10.1, 11.1, 12.1, 15.3, 15.4, 15.5.

(A) in relation to any matter not falling within (B), any one or more of:

(i) the Name’s Members’ Agent at Lloyd’s;

the Name’s Members’ Agent: the EquitasRe-reinsured SYA participant who has ceased to be a Member arguably has no members’ agency. If he is a RRC 1 Accepting Name, his relevant members’ agency has released him from all relevant liability.⁴

(ii) any agent appointed by the Name and any agent appointed by the Name’s Members’ Agent in exercise of any authority given by the Name (or appointed by any agent or sub-agent of the Members’ Agent acting under any such authority or delegation of such authority) to act as an agent or sub-agent of the Name for the purpose of conducting all or any part of the Name’s underwriting business and any successor thereto acting, or any substitute agent appointed by the Council in place of any such agent in respect of the Name;

any agent [etc.]: Equitas Re is in principle such an agent: see RRC 4, §9.1 *et seq.*

(iii) any Regulating Trustee;

(B) on or at any time after the date and time of fulfillment of the last of the conditions set out in clause 2.1 of the Equitas Reinsurance Agreement to be fulfilled, in relation to the performance of any function or discharge of any liability in respect of 1992 and Prior Business which Equitas Reinsurance Limited (“ERL”) is authorized or required by the Equitas Reinsurance Agreement to perform or discharge and in relation to the giving of Withdrawal Notices, ERL, Equitas Limited (“EL”), or any person appointed, directly or indirectly, to act on behalf of either; and

(C) as respects either (A) or (B), any Representative of the Agent.

1.3 “American business” means such part of the Name’s underwriting business at Lloyd’s (other than long term business as defined from time to time by the Insurance Companies Act, (U.K.) 1982 or by a later similar statute) as complies with the following two conditions: (i) the liability of the Name in respect thereof is expressed in U.S. dollars; and (ii) the premium payable to or for the account of the Name has been paid or is payable in U.S. dollars; excluding all such business as comprises any contract or policy of insurance or reinsurance underwritten or incepting on or after August 1, 1995 except for:

NOTE: for LATD use of “American business”, see for example *ibid.*, recital 1; *ibid.*, §§1.16, 1.19, 2.1(i), 2.2(A), 4.1(A), (B), (B)(ii), (iii), (C)(i), (ii), (E), 4.2(A), (B), (C), (D), 5.3, 12.1, 117.1, 18.1, 18.4; testamentum. *Cf.* EATD, §1 “American Business”. “American” is infelicitous: see LATD, §1.19 (non-territorial definition of “Policyholder”).

other than long term business: there is another form of LATD for long-term business.

August 1, 1995: apparently arbitrary.⁵

⁴ See RRC 1, §5.1.

⁵ See generally *One Lime Street*, August 1995, p.4 (“New deal for US trading approved”):-

Following the signing of an agreement on 24 May by [the then Chairman of Lloyd’s] and New York Superintendent of Insurance ..., new trusts will cover all business incepting on or after 1 August 1995. ... [The then Chairman of Lloyd’s] said that the new arrangements ... marked a significant step in the implementation of the *Lloyd’s: reconstruction and renewal* plan.

See the summary at *NAIC Review 1998*, p.76:-

Prior to August 1, 1995, all US premiums, regardless of the actual Situs of the risk, were channeled into this trust fund, which will continue to provide security for risks incepting prior to the changeover date.

And see for example P. K. Demmerle (an attorney at LeBoeuf, Lamb, Greene & MacRae LLP), *An Overview of Lloyd’s Plan*, *Journal of Reinsurance*, vol. 3, no. 1, Fall 1995, p.72, 76:-

One of the issues discussed in the course of the NYID examination was whether the term “liabilities” should be interpreted as being net or gross of outward reinsurance protecting Lloyd’s syndicates. Ultimately, the NYID insisted, and Lloyd’s agreed,

- (a) contracts or policies underwritten under a binding authority incepting prior to that date;
- (b) contracts or policies of insurance written pursuant to Lloyd's license in Kentucky prior to January 1, 1996; and
- (c) any contract of Reinsurance to Close for any Year of Account underwritten by the Name to the extent only that:

any contract of Reinsurance to Close ... underwritten by the Name: conventional inward-RTC necessarily effects infiltration of the liability into the inward-RTCing SYA participant's accounts, and extricates the outward-RTCD SYA participant. And see LATD, §1.16 (definition of "Name").

for any Year of Account: "any" is appropriate: *cf.* "the ... Year of Account" at LATD, §1.1. The inclusion of the phrase is still inappropriate: SYA participants are outwardly RTCD, not a SYA.

- (i) the premium payable to or for the account of the Name has been paid or is payable in U.S. dollars or the liability of the Name in respect of such contract is expressed in U.S. dollars; and
- (ii) the Name is liable under such contract in respect of contracts or policies of insurance or reinsurance underwritten by Underwriting Members of Lloyd's which either (1) incepted prior to August 1, 1995; (2) were underwritten under a binding authority incepting prior to that date; or (3) were underwritten pursuant to Lloyd's license in Kentucky prior to January 1, 1996.

1.4 "Council" means the Council of Lloyd's constituted by Lloyd's Act 1982 and (except only for the purpose of Paragraph 12.1 hereof) such persons as shall from time to time be authorized by the Council to exercise any power hereby conferred on the Council.

NOTE: for LATD use, see for example *ibid.*, recitals 3, 4; *ibid.*, §§1.2(A)(ii), 1.15, 1.22, 1.27, 1.28, 2.2(B), 3.2, 4.1(B)(iii), (C)(ii), (D), (E), 4.2(A), 4.3, 4.5, 5.2(D), 5.3, 7.1, 7.2, 7.3, 8.1, 8.1(B), 8.2, 10.1, 12.1, 13.1, 14.1, 15.1, 15.4, 16.1, 16.2, 16.3, 16.4, 16.5, testamentum.

1.5 "Equitas Reinsurance Agreement" means the Reinsurance and Run-off Contract to be entered into pursuant to which ERL will reinsure 1992 and Prior Business, as the same may from time to time be amended or supplemented.

NOTE: for LATD use, see for example *ibid.*, §§1.2(B), 1.24, 1.29, 5.3, 18.1, 18.2. In this book, "RRC 4".

1.6 "Equitas Retrocession Agreement" means the Retrocession Agreement to be entered into between ERL and EL, pursuant to which EL will agree to reinsure and indemnify ERL against, inter alia, its Reinsurance Obligation as the same may from time to time be amended or supplemented.

NOTE: this deed as extracted does not use the term except in §1.6. In this book, "RRC 5".

1.7 "Equitas Termination Notice" means a notice of termination of the Equitas Trust Agreement given in accordance with the Equitas Trust Agreement to the American Trustee, as beneficiary under the Equitas Trust Agreement.

NOTE: for LATD use, see for example *ibid.*, §4.2(E).

1.8 "Equitas Trust Agreement" means the Trust Agreement to be entered into among ERL and EL, as grantors, the American Trustee, as beneficiary, and the Equitas Trustee, as the same may from time to time be amended or supplemented.

NOTE: for LATD use, see for example *ibid.*, §§1.7, 1.9, 1.10, 1.30, 4.2(A), (E), (F), 4.3, 5.3, 16.2, 16.3, 16.4, 16.5. In this book, "EATD".

1.9 "Equitas Trust Fund" means the trust fund under the Equitas Trust Agreement and any successor or replacement trust fund.

NOTE: for LATD use, see for example *ibid.*, §§1.30, 4.2(A), (C), (D), (E), 4.5, 5.4, 13.1, 16.2. In this book, "EATF".

that for United States business incepting on or after August 1, 1995, the liabilities would be calculated without a deduction, or credit for, reinsurance recoverables. In addition, the NYID requested, and Lloyd's agreed, to create a separate trust for United States surplus lines liabilities and one for United States reinsurance liabilities. The two new United States trusts are now established The surplus lines and reinsurance trusts are each also supported by a separate ... joint asset trust. For each of the new trusts, the liabilities are re-calculated each quarter and the required assets are transferred from London into the appropriate United States trust. NYID has agreed that the Lloyd's syndicates should continue to use existing DTI-approved methods of calculating reserves for the two new trusts.

- 1.10 “Equitas Trustee” means Citibank, N.A., in its capacity as trustee under the Equitas Trust Agreement, and any successor or replacement trustee therefor or any other successor thereto.
NOTE: for LATD use, see for example *ibid.*, §§1.8, 4.2(C), (D), 5.4, 13.1, 16.1, 16.4. The term is easily confused with Equitas Policyholders Trustee (see RRC 7).
- 1.11 “Letter of Credit Obligation” shall have the meaning ascribed to it in paragraph 4.2(B).
NOTE: for LATD use, see for example *ibid.*, §§4.1(C)(iii), 4.2(A), (B), 7.7.
- 1.12 “Letter of Credit Issuer” shall have the meaning ascribed to it in paragraph 4.2(B).
NOTE: for LATD use, see for example *ibid.*, §§4.1(C)(iii), 4.2(B), 4.5.
- 1.13 “Lloyd’s American Trust Deed” means this Instrument.
NOTE: for LATD use, see for example *ibid.*, recitals 1-5; *ibid.*, §§1.16, 2.2(A), (E), 5.1, 7.2, 8.4, 10.1, 10.2, 12.1, 18.3, 19.1, testamentum.
- 1.14 “Lloyd’s American Trust Fund” or the “Trust” means the property held in trust hereunder.
NOTE: for LATD use, see *passim*.
- 1.15 “Members’ Agent” means an underwriting agent which is listed as a members’ agent on the Lloyd’s register of underwriting agents, any successor thereto, or any substitute agent appointed by the Council as a members’ agent in respect of the Name.
NOTE: For this deed’s use, see for example *ibid.*, §1.2(a)(i), (ii).
in respect of the Name: *viz.*, not in its capacity as members’ agency for any other relevant SYA participant.
- 1.16 “Name” means the Underwriting Member of Lloyd’s (which Member may be a natural person with unlimited liability or a legal person with limited liability) who or which is a party to the Lloyd’s American Trust Deed in respect of his or its American business and underwrites through the agency of the Agent.
NOTE: and see the duplicative definition at LATD, recital 1. For LATD use, see *passim*.
natural: a rare instance at Lloyd’s of use of the correct term (usually at Lloyd’s, erroneously, “individual”).
a legal person with limited liability: misleading: both the natural and the corporate Member trade at Lloyd’s with unlimited liability.
his or its American business: if conventional RTC does effect novation-by-usage, then the LAD “Name” can be presumed to be the insuring party. If conventional RTC does not effect novation-by-usage, note the absence of any insurance contract privity requirement: see LATD, §1.3(c).
- 1.17 “Net Capital Gain” means the excess in each calendar year of realized and unrealized capital gains over realized and unrealized capital losses calculated annually as of December 31.
NOTE: For this deed’s use, see for example *ibid.*, §§2.1(ii); 3.1.
- 1.18 “Other Names” means the Underwriting members of Lloyd’s (other than the Name) and such former Underwriting Member of Lloyd’s as continue to have underwriting business at Lloyd’s, not fully wound up and the personal representatives or trustee in bankruptcy of any such Underwriting Member or former Underwriting Member who has died or become bankrupt.
NOTE: for LATD use, see for example *ibid.*, §§4.1(C)(iii), (iv); 4.2(B), 4.5, 7.8, 8.1(A), 8.3, 9.1. An “Other Name” appears to be any other SYA participant regardless of syndicate and YA.
- 1.19 “Policyholder” means any policyholder to whom the Name is liable in respect of the American business.
NOTE: for LATD use, see for example *ibid.*, §§4.1(B)(iv); (C)(iii), (iv); 4.2(B), 5.1, 5.2, 5.2(B), 5.4, 5.5, 8.1, 8.3, 10.1, 18.1, 18.4. See similarly EATD, §1 definition of “Policyholder”. Note the absence of any territorial stipulation: *cf.* the territorial approach in (for example) Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.15 (definition of “Policyholder”); similarly Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §1.2 (definition of “Ceding Insurers”). Given the LATD, §1.19 definition of “Policyholder” — and see LATD, §1.3 (definition of “American business”) — there is no necessary connection to any person actually located in the US (as US state insurance regulators know⁶) while, conversely, the deed appears to provide no protection to a US assured-at-Lloyd’s who has paid a premium other than in US dollars or whose claim under the insurance contract is not

⁶ See for example *NYID Report 1995*, p.13 (italics added):-

LATFs available for payment of United States dollar claims. Therefore, policyholders and ceding insurers located outside the United States can make claims against LATF. As a major portion of Lloyd’s United States dollar business *is* written outside of the United States, assets available in LATF to protect United States policyholders and United States ceding insurers are subject to withdrawal by policyholders and ceding insurers located outside the United States.

payable in US dollars (as US state insurance regulators know⁷). *Cf.* the territorial approach in (for example) Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.15's definition of "Policyholder"; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.2 definition of "Ceding Insurers".

- 1.20 "Premiums Trust Deed" means the Lloyd's Premiums Trust Deed approved pursuant to the Insurance Companies Act (U.K.) 1982 or a later similar statute, executed by the Name in respect of insurance business at Lloyd's other than long term business.

NOTE: for LATD use, see for example *ibid.*, recital 4; *ibid.*, §§1.21, 1.23.

- 1.21 "Premiums Trust Fund" means the property held in trust subject to the provisions of the Name's Premiums Trust Deed.

NOTE: for LATD use, see for example *ibid.*, §§3.2, 4.1(D), (E), 4.3, 6.2.

- 1.22 "Qualifying Reinsurer" means an insurance company designated by the Council for the purpose of providing Reinsurance to Close.

NOTE: for LATD use, see for example *ibid.*, §1.25(A), (B). *Cf.* conventional RTC sold by a SYA stamp.⁸

- 1.23 "Regulating Trustee" means the Trustee for the time being designated as the Name's Regulating Trustee pursuant to any of the Name's Premiums Trust Deeds.

NOTE: for LATD use, see for example *ibid.*, §1.2(A)(iii).⁹

- 1.24 "Reinsurance Obligation" means the obligations of ERL and any successor thereto to the Name under the Equitas Reinsurance Agreement.

NOTE: for LATD use, see for example *ibid.*, §§1.6, 1.24, 1.25, 4.2(C), 5.3.

- 1.25 "Reinsurance to Close" shall mean:

NOTE: for LATD use, see for example *ibid.*, §§1.3(c), 1.22, 1.29. RTC is discussed elsewhere.¹⁰

- (A) in relation to any Year of Account of a Syndicate, including without limitation the 1993 or 1994 Year of Account, a reinsurance agreement under which members of a Syndicate for a Year of Account agree with the members of the same or another Syndicate for a later Year of Account or a Qualifying Reinsurer that the reinsuring members, or the Qualifying Reinsurer, as the case may be, will indemnify the members to be reinsured, without limit, against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through the Syndicate and allocated to the closed Year of Account; or

any: appropriate: *cf.* "the ... Year of Account" at LATD, §1.1.

reinsurance agreement: infelicitous: conventional RTC is not reinsurance.¹¹

- (B) in relation to the 1993 or 1994 Year of Account of a Syndicate, a reinsurance agreement whereby any Qualifying Reinsurer agrees to indemnify without limit the members of that Syndicate for that Year of Account against all 1992 and Prior Business reinsured to close into that Year of Account, taken together with an unlimited reinsurance agreement whereby the members of the same or another Syndicate for a later Year of Account or a Qualifying Reinsurer agree to reinsure all liabilities of the reinsured members arising out of insurance business underwritten through that Syndicate and allocated to the closed Year of Account other than 1992 and Prior Business;

and for the purposes of this definition only, the Reinsurance Obligation shall be deemed to be without limit.

⁷ See for example *NYID Report 1995*, p.11:-

Regulation No. 20 requires trust fund protection for all business ceded by United States insurers to Lloyd's. However, LATF fails to provide protection for business ceded by United States insurers that is expressed in pounds or Canadian dollars. Lloyd's has advised that, to the best of its knowledge, no United States insurer has ceded business to it in any currency other than United States dollars. Further, there are separate trust accounts in place outside the United States for pounds and Canadian dollars.

⁸ See p.207.

⁹ The PTD "Regulating Trustee" is fully considered at *Astor's Law of Lloyd's*, 2nd Ed.

¹⁰ See p.207.

¹¹ See p.207.

- 1.26 “Representative of the Agent” or “Representative” means one or more persons (without limitation as to number) designated by the Agent by one or more instruments in writing filed with the American Trustee as the Agent’s Representative or Representatives with power, to the extent set forth in the relevant designation, to act in like manner and with the same effect as the Agent itself might act hereunder. The designation of any person as the Agent’s Representative as hereinbefore provided shall remain effective for the period provided in the relevant designation or if no period is so provided such designation shall be effective until revoked by the Agent by an instrument in writing filed with the American Trustee.

NOTE: for LATD use of “Representative of the Agent”, see for example *ibid.*, §§1.2(C). The extracted LATD does not use “Representative” *simpliciter*.

- 1.27 “Requirements and Directions of the Council” means any requirements or directions of the Council (whether comprised in any byelaw, regulation, direction or any other written instrument issued by the Council to the Agent or other person concerned).

NOTE: for LATD use, see for example *ibid.*, §§3.2, 4.1(C)(ii), (D), 4.3, 7.1, 7.2, 7.3.

- 1.28 “Syndicate” means a group consisting of Underwriting Members of Lloyd’s, to which a particular number has been assigned by or under the authority of the Council, for whose account an underwriter accepts insurance or reinsurance business at Lloyd’s.

NOTE: for LATD use, see for example *ibid.*, §§1.25(A), (B), 1.31, 5.2(A), 5.3, 7.8. The definition is defective: a syndicate properly so called is not a group of anything: see relevant annotations to RRC 4, Sch. 2, §1’s definition of “syndicate” and “Syndicate”.

underwriter: “active underwriter” is meant.¹²

- 1.29 “Trust Term” means:

- (A) If the Name is an individual, the period from the date of commencement of the underwriting business of the Name until such underwriting business shall have been wound up or until twenty-one years after the date of death of the Name, whichever shall first occur.
- (B) If the Name is a corporation, the period from the date of commencement of the underwriting business of the Name until such underwriting business shall have been wound up or until twenty-one years after the date of death of the survivor of the President and Vice President of the United States in office at the date of commencement of such underwriting business, whichever shall first occur.

For the purposes of this definition, the Name’s underwriting business shall not be considered to have been wound up by virtue of the Name being a party to a Reinsurance to Close agreement, including, without limitation, the Equitas Reinsurance Agreement.

NOTE: for LATD use, see for example *ibid.*, §§2.1(i), 2.2(A), 6.1, 6.2.

- 1.30 “Withdrawal Notice” shall mean a Notice of Withdrawal of assets from the Equitas Trust Fund given in accordance with the Equitas Trust Agreement.

NOTE: for LATD use, see for example *ibid.*, §§1.2(B), 4.2(A), (C), (D), (E), 5.3. See principally EATD, §3(a).

- 1.31 “Year of Account” means a year which is accounted for as a separate underwriting venture by a Syndicate under Lloyd’s system of accounts.

NOTE: for LATD use, see for example *ibid.*, §§1.1 (to mean a SYA stamp), 1.3(c) (ditto), 1.25(A) (ditto), (B) (ditto); 5.3 (either a SYA, SYA stamp or UY: it is not clear). The definition’s use of “year” *simpliciter* is meaningless.¹³ The draftsman obviously intends a SYA, but clearly does not understand that it is not a time period, and that a year *simpliciter* is a time period and not a venture.

ARTICLE 2

PRINCIPAL OF THE LLOYD’S AMERICAN TRUST FUND

- 2.1 Principal of the Lloyd’s American Trust Fund shall consist of:

¹² See p.204.

¹³ See p.205.

- (i) all premiums and other monies payable including, without limitation, monies payable under any reinsurance policy, at any time during the Trust Term to the Name or to any person on behalf of the Name in connection with the American business;
- (ii) all other assets from time to time transferred to the American Trustee to be held by it as part of the Lloyd's American Trust Fund; and (iii) all investments and monies for the time being representing the same other than Net Capital Gain.

2.2

- (A) All premiums and other monies payable to the Name or to any person on behalf of the Name at any time during the Trust Term in connection with the American business shall be paid or accounted for to the American Trustee and shall until so paid or accounted for be held (by any person including the Name by whom and in whatever names the same may at any time be held) on the trusts of the Lloyd's American Trust Deed, but the American Trustee need not inquire whether this provision has been complied with, or verify the correctness of any account submitted to it, or take any steps to collect the said premiums or other monies, and the American Trustee shall only be responsible for the amounts actually received by it.
- (B) Because premiums may be received by the American Trustee before all brokerage and/or commission and/or discount payable in respect thereof has been paid, the Council may from time to time make regulations or give directions to the American Trustee regarding the payment of such brokerage and/or commission and/or discount by the American Trustee. The American Trustee shall comply with such regulations and directions, and shall be protected in so doing, without inquiring whether or not the same are authorized or appropriate.

ARTICLE 3

INCOME OF THE LLOYD'S AMERICAN TRUST FUND

- 3.1 Income of the Lloyd's American Trust Fund shall include Net Capital Gain.
- 3.2 Income of the Lloyd's American Trust Fund shall be paid to the Premiums Trust Fund or transferred to principal of the Lloyd's American Trust Fund in such amounts as the Agent may from time to time direct subject to Requirements and Directions of the Council. The American Trustee shall accept and act upon the statement of the Agent as to what income is to be paid or transferred in accordance with the foregoing provisions.

ARTICLE 4

USE OF PRINCIPAL OF LLOYD'S AMERICAN TRUST FUND

4.1 Principal of the Lloyd's American Trust Fund shall be held in trust for the following purposes:

- (A) To pay any losses, claims, returns of premiums, reinsurance premiums and other outgoings in connection with the American business.

NOTE: this is LATD's principal permissive provision. See EATD, recitals [4] and [[6] and *ibid.*, §4. And see EATD, §4 *passim*, including *ibid.*, §4(b) (LATD Trustee under no EATD obligation to pay a LATD liability at less than 100% just because Equitas Re or Equitas Ltd. is insolvent).

- (B) To pay the expenses incurred in connection with the American business, which expenses shall be deemed to include:

- (i) remuneration and proper expenses of the American Trustee;
- (ii) any salary, commission, or other remuneration payable to the Agent or any other person, or any proper expenses of the Agent or any other person, in connection with the conduct or winding up of the American business;
- (iii) the proportion related to the American business of the Name as certified or reported by auditors approved by the Council of:
 - (a) any salary, commission, or other remuneration payable to the Agent, or any proper expenses of the Agent, in connection with the conduct or winding up of any underwriting business of the Name; and
 - (b) any expenses whatsoever from time to time incurred in connection with any underwriting business of the Name;
- (iv) the costs of any surety or other bonding arrangements required in connection with litigation in respect of any claim by any Policyholder of the Name; and
- (v) other expenses in connection with the management and investment of the Lloyd's American Trust Fund hereunder.

- (C) To make, in particular, such transfers of cash and other property out of, or establish such accounts or subaccounts within, the Lloyd's American Trust Fund and transfer therein cash and such other property, in each case from time to time as may be required:

- (i) by the insurance regulatory bodies of one or more of the United States in respect of the American business; or
- (ii) to meet one or more contributions levied on the Name in respect of the American business pursuant to Requirements and Directions of the Council, but only to the extent that such transfers out of the Lloyd's American Trust Fund are approved by the Superintendent of Insurance of the State of New York; or

Superintendent of Insurance of the State of New York: pre-eminently among US state insurance regulators in relation to the Lloyd's enterprise, the Superintendent of Insurance of the State of New York has various express functions in relation to the LATD including approval to use trust assets to meet relevant levies on the "Name" (LATD, §4.1(C)(ii)); approval the transfer of surplus trust assets at certain times to PTFs (*ibid.*, §4.1(E)); approval withdrawal of trust assets following an "Equitas Termination Notice" (*ibid.*, §4.2(E)); receive notification of LATF insufficiency; his consequential functions (*ibid.*, §5.3); recipient of various information (*ibid.*, §8.1) (6) his right to examine LATF "assets" (*ibid.*, §8.3); recipient of notice where trust aggregate outgoings exceed \$400m in a calendar month (*ibid.*, §8.4); power to consent to LATD amendment, and recipient of notice of LATD amendment (*ibid.*, §12.1); recipient of notice concerning the Equitas Trustee's successor (*ibid.*, §16.1); recipient of notice that the trustee has received notice to transfer EATD assets; approval of that transfer (*ibid.*, §16.2); *ditto* re EATD amendment (*ibid.*, §16.3); recipient of notice that the DTI has ordered "Lloyd's" to cease trading (*ibid.*, §18.2); power to intervene under New York Insurance Law, Art. 74 (*ibid.*, §18.3); and how to apply the held trust assets (*ibid.*, §18.4).

- (iii) to secure and/or to pay each Letter of Credit Issuer any of the Name's several Letter of Credit obligations (proportionate to the Name's respective share of the obligations to which the Letter of Credit relates on the part of the Name, and of one or more of the Other Names) arising with respect to the issuance of a Letter of Credit in connection with a Policyholder of the Name; or

Note: see LATD, §4.2(D). The provision is specific to relevant letters of credit.

- (iv) to secure and/or to pay the Name's several obligations (proportionate to the Name's respective share of the obligations of the Name and one or more Other Names) arising with respect to any surety or other bonding arrangement in connection with litigation by a Policyholder of the Name.

Note: see LATD, §4.2(D). The provision is specific to relevant litigation.

- (D) To transfer to the Premiums Trust Fund annually, if requested by the Agent, such property of the Lloyd's American Trust Fund as is certified or reported by auditors approved by the Council to exceed the amount required to be held in the Lloyd's American Trust Fund by Requirements and Directions of the Council from time to time in force in relation to the annual solvency test, the property so transferred to be held and dealt with as part of the Premiums Trust Fund.

NOTE: such transfers are used in accordance with the relevant PTD, including, in appropriate circumstances (often as adjudged by the SYA participant's managing agency), remitted to the SYA participant as "profit".

- (E) Subject to prior, written approval by the Superintendent of Insurance of the State of New York, to transfer to the Premiums Trust Fund at any other time, if requested by the Agent and approved by the Council, such property of the Lloyd's American Trust Fund as is certified or reported by auditors approved by the Council to exceed the amount required to be held in the Lloyd's American Trust Fund for the purpose of providing for all liabilities both actual and estimated in respect of the American business.

NOTE: cf. EATD, §4(a)(vii).

4.2

- (A) The American Trustee shall accept and act upon the statement of the Agent as to what sums are from time to time required to be paid out of, or to be segregated (whether in an account or subaccount or otherwise) within, the Lloyd's American Trust Fund (including, without limitation, to secure and pay Letter of Credit obligations in accordance with clause (C)(iii) of paragraph 4.1), and to whom payable, and what sums are to be withdrawn from the Equitas Trust Fund, for any of the purposes specified in this Article without requiring the accuracy of any such statement to be verified and shall be fully protected in so doing, without inquiring whether or not the same is authorized or appropriate, provided, however, that such statement shall be accompanied, where required by this Article, by a certificate or report of auditors approved by the Council and, where so required, by written evidence of such approval; and provided further that such statement does not conflict with any regulation or direction of the Council to the American Trustee pursuant to paragraph 2.2(B). Any statement of the Agent as to sums to be paid out of, or to be segregated within, the Lloyd's American Trust Fund for any of the purposes specified in this Article insofar as such statement purports to be in respect of 1992 and Prior Business that is American business shall, insofar as the Equitas Trust Agreement permits, be deemed to include a direction from the Agent to issue a Withdrawal Notice for, and collect from the Equitas Trust Fund, assets necessary to effect such purpose, pursuant to the applicable provisions of paragraph 4.2 (C) and (D) and the American Trustee shall be fully protected in so doing, without inquiring whether or not the same is authorized or appropriate, and without verifying whether the purpose to be served is in respect of 1992 and Prior Business or the Agent is so authorized.

NOTE: see EATD, recital [6].

purports to be in respect of 1992 and Prior Business that is American business [etc.]: these liabilities are to be paid from the EATF by the LATF trustee issuing a EATD, §3(a) Withdrawal Notice: see also *ibid.*, §4(a)(i) (EATD funds withdrawn to meet LATD liabilities).

- (B) The American Trustee shall enter into agreements with issuers of letters of credit, which may include the American Trustee in its individual capacity (on its behalf or on behalf of any of its subsidiaries, affiliates or associates), or any other person, at the direction of the Agent, (i) to issue letters of credit (and to maintain, reinstate, renew, amend, supplement or otherwise modify such letters of credit) relating to the obligations of the Name and one or more other Names to one or more Policyholders in respect of the American business (each such letter of credit being a "Letter of Credit", and each such issuer of a Letter of Credit being a "Letter of Credit Issuer"), each Letter of Credit to be on such terms and conditions,

and to give rise to such several obligations proportionate to the Name's respective share of the obligations to which the Letter of Credit relates (including, without limitation, reimbursement obligations, obligations to pay interest, fees, costs, expenses and indemnities) on the part of the Name, and each of such other Names, to the respective Letter of Credit Issuer (such obligations to such Letter of Credit Issuer being, collectively, "Letter of Credit Obligations"), (ii) to furnish, maintain, commingle, invest and apply the collateral securing the Letter of Credit Obligations, (iii) to grant or waive such rights of setoff, charge and application and (iv) to provide for such other rights and remedies all as the Agent and the American Trustee and such Letter of Credit Issuer shall agree.

- (C) The American Trustee shall, when so directed by the Agent, immediately issue a Withdrawal Notice for, and collect from the Equitas Trust Fund, assets in respect of any portion of ERL's Reinsurance obligation in respect of 1992 and Prior Business that is American business. In the event that the American Trustee has, at the direction of the Agent, collected funds from the Equitas Trust Fund in respect of any portion of ERL's Reinsurance Obligation in respect of 1992 and Prior Business that is American business and is unable to apply such funds as directed, or in the event that the American Trustee receives a return of funds paid out of the Lloyd's American Trust Fund in respect of 1992 and Prior Business that is American business, the American Trustee shall transfer such unapplied or returned funds, together with any income earned thereon, to the Equitas Trustee for deposit to the Equitas Trust Fund.

NOTE: see EATD, §§3(a) and 4(a)(i).

- (D) The American Trustee shall, when so directed by the Agent, immediately issue a Withdrawal Notice for, and collect from the Equitas Trust Fund, assets necessary to secure, and/or to pay, a Name's obligation under paragraphs 4.1(C)(iii) and (iv), provided that such security and/or payment arises in respect of 1992 and Prior Business that is American business. Assets withdrawn from the Equitas Trust Fund in order to provide security for such obligations shall, to the extent reverting to the American Trustee upon termination, expiration or release from such security, be transferred, together with any income earned thereon, to the Equitas Trustee for deposit to the Equitas Trust Fund.

to secure, and/or to pay, a Name's obligation under paragraphs 4.1(C)(iii) and (iv): see EATD, §§3(a) and 4(a)(iv) and (iii) respectively.

- (E) Upon receipt of an Equitas Termination Notice, accompanied by: (i) the written certification by the grantor under the Equitas Trust Agreement as to the obligations (as defined in the Equitas Trust Agreement) remaining unliquidated and undischarged as of the proposed date of termination; and (ii) a report of one or more firms of independent actuaries as to the amount of such obligations as of the date set forth in such report, which date shall be within 90 days of the proposed date of termination, the American Trustee shall immediately issue a Withdrawal Notice for, and collect from the Equitas Trust Fund, assets held in such trust fund in an amount equal to the sum of such obligations, provided that no amount shall be withdrawn pursuant to this paragraph 4.2(E) unless the American Trustee shall have received the prior written approval of the Superintendent of Insurance of the State of New York for such termination. The American Trustee shall deposit such amounts in a separate account, apart from its other assets and not as part of the trust funds established by this Lloyd's American Trust Deed, in the name of the American Trustee, in any bank or trust company organized in the United States (including, without limitation, the American Trustee) in trust for the purposes specified in the subparagraphs of Section 4(a) of the Equitas Trust Agreement.

Equitas Termination Notice: see generally EATD, §13(b).

- (F) The American Trustee is authorized to enter into and perform its obligations under the Equitas Trust Agreement as beneficiary thereunder and shall be fully protected in withdrawing funds for transfer to or for the account of the grantor thereunder pursuant to the provisions of the Equitas Trust Agreement permitting such transfer in reliance on the statement of the grantor that such funds are required for application to a purpose so permitted, without any

obligation to inquire, or any liability for omitting to inquire, as to the application of such funds.

withdrawing funds: see generally EATD, §3-4, including *ibid.*, §4(b) (LATD Trustee under no EATD obligation to pay a LATD liability at less than 100% just because Equitas Re or Equitas Ltd. is insolvent).

- 4.3 The American Trustee shall not be required to inquire and shall not be liable for omitting to inquire as to: (i) the accuracy of any certificate or report of the said auditors furnished to it under the provisions of this Article; or (ii) whether such certificate or report has been prepared in accordance with Requirements and Directions of the Council; or (iii) the propriety of any approval by the Council; or (iv) the accuracy of any certificate or determination of the grantor under the Equitas Trust Agreement or of any report of independent actuaries as to the Obligations (as defined in the Equitas Trust Agreement). The American Trustee shall be fully protected in relying upon any auditors' certificate or report or any resolution of the Council determining what transfers may be made to the Premiums Trust Fund under the foregoing provisions of this Article. The American Trustee shall be fully protected in relying upon any certification or determination by the grantor under the Equitas Trust Agreement or any report of independent actuaries with respect to the obligations (as defined in the Equitas Trust Agreement) under the foregoing provisions of this Article.
- 4.4 With respect to sums requested by the Agent to be paid in accordance with this Article, the American Trustee shall either make payment directly in the amounts and to the person or persons specified by the Agent, or, in its discretion, make payment to the Agent to be disbursed by the Agent in the manner specified. The American Trustee shall have no duty to see to the application of payments so made to the Agent, nor shall it be liable for the misapplication of such payments.
- 4.5 No principle of conflict of interest or any duty of undivided loyalty shall apply to, and any such conflict of interest or duty of undivided loyalty is hereby deemed waived with respect to, any transactions with or services provided to any one or more of the Trust Fund, the Council, the Name or the Other Names, by the American Trustee acting in its individual capacity (or by any subsidiary, affiliate or associate of the American Trustee) or in its capacity as trustee of Lloyd's Central Fund United States Trust Fund, Lloyd's Central Fund United States Trust Fund (Number 2), Lloyd's American Surplus or Excess Lines Insurance Joint Asset Trust Fund, Lloyd's American Credit for Reinsurance Joint Asset Trust Fund, any Lloyd's United States Situs Surplus Lines Trust Fund, any Lloyd's United States Situs Credit for Reinsurance Trust Fund, the Equitas Trust Fund, or of any other trust that may be created from time to time (including, without limitation, any trust established to provide security to policyholders in respect of, or in respect of reinsurance assumed covering, liabilities of the Name or the Other Names for prior years) or any Letter of Credit Issuer, including without limitation, the issuance of Letters of Credit and the investment management of the assets of the Trust Fund, provided however, that such transactions or services or such conflict of interest or duty of undivided loyalty relate to one or more of such Trust Fund.

Lloyd's American Surplus or Excess Lines Insurance Joint Asset Trust Fund: viz., the Lloyd's US Surplus-Lines Common-Use Trust Fund.

Lloyd's American Credit for Reinsurance Joint Asset Trust Fund: viz., the Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund

any Lloyd's United States Situs Surplus Lines Trust Fund: viz., any Lloyd's US Surplus-Lines Personal-Use Trust Fund.

any Lloyd's United States Situs Credit for Reinsurance Trust Fund: viz., any Lloyd's US Credit-for-Reinsurance Personal-Use Trust Fund.

Equitas Trust Fund: viz., the EATF.

ARTICLE 5

RIGHTS OF POLICYHOLDERS

NOTE: cf. EATD, which contains no express provisions entitling direct access by any EquitasRe-assured-at-Lloyd's.

- 5.1 The Lloyd's American Trust Fund shall enure for the benefit of all Policyholders. No Policyholder shall be entitled at any time to charge the American Trustee in respect of any assets, other than the assets of the Lloyd's American Trust Fund in the hands of the American Trustee at the time the Policyholder's claim becomes enforceable as herein provided. Nor even after his claim becomes enforceable as herein provided, shall any Policyholder be entitled to require from the American Trustee any account, or otherwise to inquire into the course of administration of the trusts relating to the Lloyd's American Trust Fund, or to question any act or thing done or suffered by the Ameri-

can Trustee, or otherwise to enforce such trusts, the sole right under the Lloyd's American Trust Deed of such Policyholder being to receive the amount of his claim after it has become enforceable as herein provided from the assets of the Lloyd's American Trust Fund then actually in the hands of the American Trustee and available for such payment as provided in paragraph 5.4.

- 5.2 The claim of a Policyholder against the Lloyd's American Trust Fund shall become enforceable within the meaning of this Article when all of the following conditions have been complied with:

NOTE: and see EATD, §12(a)(4)(b). Compliance with LATD, §5.2 is one condition to EATD "inadequacy": see EATD, §12(a)(4)(b) *et seq.*

- (A) A judgment has been obtained by the Policyholder in any court of competent jurisdiction within the United States against the Name or against the Syndicate through which the Name underwrites in respect of the Name's liability under a policy.

judgment ... in any court: *cf.* the inclusion of arbitration awards at (for example) Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(a)-(b). Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.3(a) etc. does not mention arbitration awards.

within the United States: to the extent that the EquitasRe-assured-at-Lloyd's has no relevant connection to the United States — and premiums or claims money payable in US dollars does not mean that the insurance contracts' governing law is a US state; there may not even be a service-of-suit clause — this may be a severe imposition. *Cf.* the substantially identical US judgment provision at for example Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(a), but which deed (at *op. cit.*, §1.15, definition of "Policyholder") uses a materially different term requiring connection with the US (see similarly Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.2's definition of "Ceding Insurers").

against the Name or against the Syndicate through which the Name underwrites in respect of the Name's liability under a policy: since the LATF is a personal-use fund, the most that any one particular LATF (a personal-use fund) will provide to the assured-at-Lloyd's is the relevant debt of the relevant one particular Name, regardless that the assured-at-Lloyd's has obtained a judgment against every liable SYA participant on the policy. *Per* Lloyd's Act 1982, s.8(1), that debt is limited in amount to the SYA participant's own insurance contract: per the SYA-level separate contracts rule, each subscribing SYA participant enters into his own discrete insurance contract with the assured-at-Lloyd's.¹ *Cf.* recourse to common-use funds such as (for example) Lloyd's US Surplus-Lines Common-Use Trust Fund and Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund.

liability under a policy: in LATD (as in EATD), no express mention is made of exemplary or punitive damages: *cf.* Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.3(i); Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.3(i). Equitas Re's RRC 4, §3 Reinsurance Obligation extends to punitive and penal damages" *ibid.*, §3.2; and see similarly Equitas Ltd.'s RRC 5, §2.3 Retrocession Obligation.

- (B) Such judgment has become final in the sense that the particular litigation has been concluded either through the failure to appeal within the time permitted therefor or through the final disposition of any appeal or appeals that may be taken. The word "appeal" as used in this paragraph 5.2 shall include any similar procedure for review permitted by the applicable law.
- (C) The filing with the American Trustee of a certified copy of the said judgment, together with such proof as to its finality, and its conformance with the other conditions specified in this paragraph 5.2 as the American Trustee shall require.
- (D) The expiration of a period of thirty (30) days from the date of the filing of the said certified copy of the said judgment and all of the said proofs with the American Trustee without the American Trustee having received notice from the Council that such judgment has been satisfied.

NOTE: failure to pay under this sub-paragraph is one of three all-must-be-satisfied preconditions to the LATD being deemed "inadequate" under *ibid.*, §18.1(b). See similarly Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.3.

- 5.3 Upon the filing with the American Trustee pursuant to paragraph 5.2(C) above of a certified copy of the judgment and such proofs as to the judgment's finality as the American Trustee may require, the American Trustee shall promptly notify the Agent, the Council, and the grantor under the Equitas Trust Agreement of the filing and that said judgment has not been satisfied, and shall provide copies of said judgment and said proofs to the Agent, the Council and the grantor under the Equitas Trust Agreement. The American Trustee shall advise the Agent, the Council and the grantor under the Equitas Trust Agreement not later than fifteen (15) days prior to the expiration of the thirty (30) day period referred to in paragraph 5.2(D) above of whether in the opinion of the

¹ See pp.75, 180.

American Trustee the conditions set forth in paragraph 5.2 have been met on the basis of the evidence specified in such section (except as to whether the judgment is one in respect of American business and the Syndicate and Years of Account to which the judgment relates). The Council shall advise the American Trustee, the Agent and the grantor under the Equitas Trust Agreement, not later than ten (10) days prior to the expiration of the thirty (30) day period referred to in paragraph 5.2(D) above, whether the judgment is one in respect of American business and of the Syndicate(s) and Year(s) of Account to which the claim relates, and if such claim relates to more than one Syndicate or Year of Account, the portion of such claim that relates to each Syndicate and Year of Account. If the Council does not furnish such advice to the American Trustee ten (10) days prior to the expiration of the period described in paragraph 5.2(D) above, then such judgment shall be deemed to relate to American business exclusively attributable to the 1993, 1994, 1995 or later Years of Account, provided, however, that if the Lloyd's American Trust Fund lacks sufficient funds to pay such judgment, the American Trustee shall notify the Superintendent of Insurance of the State of New York of such fact, and the Superintendent shall thereupon determine and notify the Council and the American Trustee whether such judgment relates, in whole or in part (and if in part, the portion thereof which so relates), to liability in respect of 1992 and Prior Business that is American business. If the Council advises the American Trustee that such judgment does relate, in whole or in part, to liability in respect of 1992 and Prior Business that is American business, or if the Superintendent makes such determination in accordance with the foregoing sentence, and the American Trustee has determined that the claim otherwise satisfies the conditions prescribed in paragraph 5.2 above, the American Trustee shall issue a Withdrawal Notice for, and collect from the Equitas Trust Fund, assets in respect of ERL's Reinsurance Obligation as it relates to the portion of the judgment which the American Trustee has been advised has been determined to relate to 1992 and Prior Business that is American business. The Council may at any time notify the American Trustee if a claim has been satisfied prior to the expiration of the period set forth in paragraph 5.2(D). In making a determination whether a claim has satisfied the conditions set forth in paragraph 5.2 above, the American Trustee shall be fully protected in relying upon the information furnished to it by the Council and the Agent and shall not be required to inquire, and shall have no liability for omitting to inquire, as to the accuracy or propriety of such information. Nothing in this paragraph 5.3 shall affect the rights of parties under the Equitas Reinsurance Agreement.

NOTE: see similarly Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.3.

- 5.4 Where the claim of any Policyholder becomes enforceable as defined in paragraph 5.2, the judgment therein referred to shall be forthwith satisfied by the American Trustee out of the Lloyd's American Trust Fund without regard to the rights of the other Policyholders or any payment that may be then due for any of the purposes specified under Article 4 hereof, other than the remuneration and expenses of the American Trustee, which shall be entitled to priority of payment to the extent such remuneration and expenses of the American Trustee due at the time the claim becomes enforceable do not exceed 1% of the value, as at December 31 of the preceding year, of principal and income of the Lloyd's American Trust Fund (which shall be deemed to include the principal and income of the Equitas Trust Fund as at such date to the extent funds were transferred from the Lloyd's American Trust Fund to the Equitas Trust Fund). Nothing in this Article shall entitle the American Trustee to payment or reimbursement from the Lloyd's American Trust Fund of the fees and expenses of the Equitas Trustee or to any indemnity in respect thereof.

NOTE: see similarly Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.3.

- 5.5 The American Trustee shall be fully protected and shall incur no liability for any action taken or any failure to act or any omission by it in good faith hereunder, and shall be fully protected in relying upon the opinion of its counsel in New York as to whether or not any judgment obtained by a Policyholder conforms with all of the conditions specified in paragraph 5.2 of this Article, including, without limitation, whether or not the court in which such judgment was obtained is a court of competent jurisdiction within the meaning of the said paragraph, and whether or not such judgment is final within the meaning of the said paragraph. In the event of any suit or proceeding brought against the American Trustee based upon a judgment obtained by a Policyholder against the Name in respect of the Name's liability under a policy, the American Trustee shall be entitled

to charge against the Lloyd's American Trust Fund any expenses incurred by it in the said suit, including attorneys' fees, and also any judgment obtained against the American Trustee, including interest and costs.

ARTICLE 6

NAME'S BENEFICIAL INTEREST; DISTRIBUTION AT EXPIRATION OF TRUST TERM

- 6.1 Subject to the aforesaid trusts, the Lloyd's American Trust Fund shall be held in trust during the Trust Term for the Name, his executors or administrators or his or its successors or assigns.
- 6.2 Upon the expiration of the Trust Term, principal and income of the Lloyd's American Trust Fund shall be distributed to the Name or to his executors or administrators or his or its successors or assigns; provided, however, that if the underwriting business of the Name shall not have been wound up upon the expiration of the Trust Term, and if the Name's Premiums Trust Fund shall then be in existence, principal and income of the Lloyd's American Trust Fund shall be paid to the Name's Premiums Trust Fund.

ARTICLE 7

ADMINISTRATION AND INVESTMENT

- 7.1 The Lloyd's American Trust Fund shall be managed and invested by the American Trustee at the direction of the Agent, subject to Requirements and Directions of the Council; provided, however, that, subject to paragraph 7.3, all investments of the Lloyd's American Trust Fund shall be, and the Agent shall only direct the American Trustee to make and retain such investments as are, of a kind permitted under the insurance laws of the State of New York, or of another United States jurisdiction with substantially similar laws, in effect from time to time which investments may include obligations of the American Trustee in its individual capacity or any subsidiary, affiliate or associate thereof.

| **NOTE:** *cf.* EATD, §2(c).

- 7.2 In connection with the management and investment of the Lloyd's American Trust Fund, the American Trustee shall have all powers now or hereafter granted to a fiduciary by New York law, and in addition shall have power (provided, however, that the American Trustee shall exercise its said powers only as and to the extent directed to do so by the Agent), subject to Requirements and Directions of the Council, to engage in securities lending transactions for the account of the Lloyd's American Trust Fund upon such terms and conditions as the Agent may direct, but only if the collateral for any such transaction is held pursuant to this Lloyd's American Trust Deed.
- 7.3 The American Trustee shall not be bound to inquire, and shall have no liability for omitting to inquire, whether the Agent has complied with the Requirements and Directions of the Council or with the requirements of, or whether the investments directed to be made by the Agent or held by the American Trustee in the Trust are of a kind permitted under, the insurance laws of the State of New York or of any other United States jurisdiction with substantially similar laws, or as to the necessity, expediency or propriety of any such investment and shall be fully protected in acting at the direction of the Agent with respect to any investment and, unless otherwise directed by the Agent, shall be under no duty to take, and shall have no liability for omitting to take, any action with respect to investments other than to collect the income or other sums payable thereon.
- 7.4 Provided it shall have received actual notice thereof, the American Trustee shall notify the Agent of conversion or subscription or other rights accruing on property held in the Lloyd's American Trust Fund and of any default in the payment of principal or interest or the passing of any dividend or other payment in respect of any such property. Copies of such notice may be addressed to the Agent in care of Lloyd's, London.
- 7.5 As and when (but not otherwise) directed by the Agent in each particular case, the American Trustee shall exercise, sell or waive all conversion, subscription, voting and other rights of whatsoever nature including options and warrants, and grant proxies, discretionary or otherwise.

- 7.6 Unless the Agent shall otherwise direct, the American Trustee may register and hold property of the Lloyd's American Trust Fund in its own name or in the name of its nominee, or in an appropriate depository, without adding words descriptive of its fiduciary character.
- 7.7 The American Trustee shall withdraw from, or shall segregate (whether in an account or subaccount or otherwise) within the Lloyd's American Trust Fund such monies or other property as the Agent may direct for any of the purposes to which the Lloyd's American Trust Fund is applicable hereunder including, without limitation, for the repayment of any Letter of Credit Obligations.
- 7.8 Unless the Agent shall otherwise direct, the Lloyd's American Trust Fund may be commingled with the Lloyd's American Trust Fund of any of the Other Names, provided, however, that the American Trustee shall have no obligation to maintain, and shall have no liability for omitting to maintain, records of any payments, withdrawals, receipts, borrowings, pledges or other transactions involving the Trust, except to the extent the Agent shall furnish the American Trustee data with respect thereto, in such form and detail as is sufficient to permit the American Trustee to maintain such records; further provided, that the American Trustee shall have no obligation to maintain, and shall have no liability for omitting to maintain, records as to transactions involving individual Names or Trusts, it being understood and agreed that the American Trustee shall maintain records of the activity of the group accounts maintained by the Agent comprising all or a portion of one or more Syndicates and for one or more Years of Account as a whole for which it has been provided data by the Agent. The Name shall provide the American Trustee on a timely basis with any and all information, certifications, proofs and other applicable documentation required under the Internal Revenue Code of 1986, as amended, or by any other applicable law.

NOTE: the LATF trustee "intermingling" Names' LATFs, and using one SYA participant's LATF to pay the LATF debts of an "Other Name" — see for example LATD, §9.1 — has been the subject of litigation: see for example *In re Lloyd's American Trust Fund Litig.*, 954 F. Supp. 656 (S.D.N.Y. 1997). On accounting generally, see for example LATD, §11.1.

group accounts: the premise is that it is impracticable to maintain records for each individual SYA participant.

no obligation to maintain, and shall have no liability for omitting to maintain, records [etc.]: but see LATD, §8.1(A). Cf. RRC 4, §15.3(b).

- 7.9 The Agent may direct that all or any of the powers conferred on it by this Article of giving directions relating to the management and investment of the Lloyd's American Trust Fund shall be delegated to such company or other person (including any subsidiary, affiliate or associate of the American Trustee) on such terms and subject to such conditions, with such remuneration payable out of the Lloyd's American Trust Fund, as the Agent may think fit and agree with the company or other person to whom the delegation is to be made, and the Agent may at any time revoke or agree to vary any such delegation.
- 7.10 If the American Trustee (in its individual capacity or through any subsidiary, affiliate or associate of the American Trustee) advances cash or securities to the Trust to effect or expedite the purchase or sale of securities for the Trust, the property so purchased or the proceeds from the sale shall be security for repayment of the cash or securities advanced in connection with the purchase or sale of such property and the American Trustee (in its individual capacity or through any subsidiary, affiliate or associate of the American Trustee) shall have a security interest in such property or proceeds until the American Trustee (in its individual capacity or through any subsidiary, affiliate or associate of the American Trustee) has been reimbursed from the Trust for its advances in respect of such property. If the American Trustee (in its individual capacity or through any subsidiary, affiliate or associate of the American Trustee) does not receive reimbursement from the Trust for its advances in respect of such property, the American Trustee (in its individual capacity or through any subsidiary, affiliate or associate of the American Trustee) shall be entitled to dispose of such property and to retain the proceeds of such disposition, or to retain such proceeds for its own account up to the amount necessary to obtain reimbursement, and shall be further entitled to reimbursement from the Trust for any portion of any such advance not so reimbursed.

ARTICLE 8

AMERICAN TRUSTEE TO FURNISH INFORMATION

8.1 If and to the extent required by the insurance laws or the regulations thereunder of a state where the Lloyd's American Trust Fund serves as security for Policyholders with respect to such state, the American Trustee shall (when directed by the Council to do so) furnish to the Commissioner, Director or Superintendent of insurance of such state:

- (A) a statement of the assets held in the Trust and, where such assets are commingled, in the Lloyd's American Trust Funds of the Other Names and the fair market value thereof as of the date such statement is required; and

| where such assets are commingled: see LATD, §7.8.

- (B) a statement that it has been advised by the Council that no termination of the Trust is planned, or a statement of the proposed effective date of termination if a termination of the Trust is planned.

8.2 Notwithstanding the foregoing provisions of this Article, the American Trustee shall have no duty to ascertain what statements (if any) are required to be furnished thereunder or how the fair market value of assets held in the Trust is required to be determined or to determine the fair market value of any such assets other than assets for which a fair market value is readily determinable from published sources and shall have no duty to take any action with respect to such statements except as directed by the Council and shall be fully protected in acting upon the directions of the Council. Whenever the American Trustee in the performance of its duties hereunder shall be required to value the assets of the Trust, it may employ an agent for such valuation, which may be the American Trustee acting in its individual capacity (or any subsidiary, affiliate or associate thereof), and be reimbursed from the Trust for any costs or expenses of valuations performed either by the American Trustee or by any such agent.

8.3 An authorized representative of the Commissioner, Director or Superintendent of insurance in a state where the Lloyd's American Trust Fund serves as security for Policyholders with respect to such state may from time to time examine the assets of the Trust and, where such assets are commingled, the Lloyd's American Trust Funds of the Other Names at the offices of the American Trustee. The American Trustee shall be reimbursed from the Trust for its expenses in connection with any such examination.

| NOTE: cf. EATD, §9(g).

8.4 The American Trustee shall provide the Superintendent of Insurance of the State of New York with prompt written notice if and when the aggregate outgoings (for such purposes as are described in paragraph 4.1) under the Lloyd's American Trust Deed (net of the aggregate of any incomings under the Lloyd's American Trust Deed and excluding investment transactions and any proceeds therefrom) equal or exceed \$400,000,000 in any single calendar month.

| NOTE: see similarly EATD, §9(i).

ARTICLE 9

NAME NOT A PARTNER WITH AGENT OR OTHER NAMES

9.1 Nothing herein contained shall constitute a partnership between the Name and the Agent or between the Name and any of the Other Names, the underwriting business of the Name being carried on for his or its own sole and separate account.

| NOTE: see the relevant annotation to RRC 4, recital (J). US federal jurisprudence analogising syndicates or SYAs to partnerships appears to be based on misunderstanding.¹ See generally Lloyd's Act 1982, s.8(1).

¹ And see the apparent misunderstanding at *NYID Report 1995*, p.12: "[I]t appears that in order to assure proper security for all United States policyholders and United States ceding insurers Lloyd's needs to determine and be able to report each Name's assets in LATF and each Name's United States dollar liabilities or amend LATF so that assets are held on a joint and several basis."

ARTICLE 10

COUNCIL APPROVAL PROTECTS AMERICAN TRUSTEE; LIMITATION ON PROTECTION OF AMERICAN TRUSTEE

- 10.1 If any difference shall at any time arise between the American Trustee and the Name or his executors or administrators or his or its successors or assigns, or between the American Trustee and the Agent, relating to the trusts under the Lloyd's American Trust Deed, or the administration thereof, or anything connected therewith, or if the American Trustee shall at any time feel any doubt or difficulty in administering the said trusts, it shall be an absolute protection to the American Trustee against all claims and demands whatsoever by the Name, his executors or administrators or his or its successors or assigns, or by the Agent, or by any other person (including any Policyholder), that in case of any act or thing already done or omitted by the American Trustee the Council shall approve of such act or thing having been so done or omitted, and that in the case of any act or thing intended to be done or omitted the Council shall approve of such intended act or omission, and it shall not be necessary for the Council to give any reason for any such approval. In furtherance and not in limitation of the foregoing, the obligations of the American Trustee to take action at the direction of the Agent shall be subject to such procedures, conditions and limitations as may be agreed from time to time by the American Trustee and the Agent, and if the American Trustee encounters any difficulty in administering the said trusts in connection with any direction received from the Agent, it shall be a full protection to the American Trustee that the American Trustee has obtained approval of the Council with respect to such direction, and where it has sought and is awaiting such approval the American Trustee shall have no liability for failing to take such direction pending receipt of such approval. The foregoing provisions of this Article are only for the protection of the American Trustee and shall not be construed to impose any obligation on the American Trustee to apply for any such approval of the Council, nor shall the American Trustee be under any liability for omitting to do so.
- 10.2 Notwithstanding any other provision of the Lloyd's American Trust Deed, the American Trustee shall be protected for any action taken, any failure to act or any omission by it hereunder in good faith, except that it shall not be protected in respect of any acts, failures to act or omissions by it which are fraudulent or which constitute gross negligence.

ARTICLE 11

ACCOUNTING BY AMERICAN TRUSTEE

- 11.1 The American Trustee shall submit to the Agent, whenever requested by the Agent in writing, an account in respect of its acts and proceedings as such trustee, but no more often than semi-annually (except in the case of the death or retirement of the Name or in the event of the removal or resignation of the American Trustee). The approval of any account of the American Trustee by the Agent shall be binding and conclusive upon any and all persons interested hereunder, and shall constitute a complete discharge and acquittance to the American Trustee with respect to any and all matters covered by such account, and the American Trustee shall not thereafter be accountable to any person whomsoever with respect to its acts and proceedings during the period covered by such account. The American Trustee shall not be required to account to any person other than the Agent.

NOTE: cf. EATD, §9(f); RRC 4, §15.3. On group accounts, see for example LATD, §7.8.

ARTICLE 12

AMENDMENT, REVOCATION AND REPLACEMENT OF THE LLOYD'S AMERICAN TRUST DEED

- 12.1 The Council shall have power in its discretion to amend the Lloyd's American Trust Deed and also to revoke the trusts created hereunder; provided that its power to revoke the trusts created hereunder shall not be exercised by the Council unless the Council is satisfied that all liabilities both actual and estimated of the Name in respect of the American business have been met or provided for and shall have so notified the American Trustee; and provided that any revocation of the trusts hereunder shall not be effective until five years (or any shorter period that may be permitted pursuant to the provisions of the New York State insurance law, or the regulations

thereunder) from the date on which the Council shall notify the American Trustee in writing of the Council's intention to revoke such trusts; except that the foregoing proviso shall not be deemed to prevent the replacement of the trusts hereunder with another trust or trusts meeting the requirements of the New York State insurance law, or the regulations thereunder; and provided that notice of the decision to replace the trusts shall be given to the American Trustee at least one year before such trust or trusts shall become effective. No amendment, replacement or revocation of the Lloyd's American Trust Deed shall become effective without the prior written consent of the Superintendent of Insurance of the State of New York. The Council shall give written notice of any proposed amendment to the American Trustee and shall direct the American Trustee to give written notice to the Commissioner, Director or Superintendent of Insurance of each state identified by the Council as requiring such notice ("Commissioner") together with a copy of the proposed amendment. A proposed amendment shall be effective on the date specified by the Superintendent of Insurance of the State of New York unless the American Trustee receives notice that a Commissioner disapproves the proposed amendment within thirty (30) days of receipt of the notice by such commissioner. The Council shall give written notice to the American Trustee, to the Agent (and the Agent shall in turn notify the Name) and to the Superintendent of Insurance of the State of New York of any such amendment, replacement or revocation and of the effective date thereof.

ARTICLE 13

REMUNERATION OF AMERICAN TRUSTEE

- 13.1 The Council may make such arrangements with the American Trustee as the Council and the American Trustee think fit as to the remuneration of the American Trustee and any such remuneration shall be an expense of the Lloyd's American Trust Fund. The American Trustee shall be entitled to reimbursement out of the Lloyd's American Trust Fund of any reasonable expenses (including, without limiting the generality of the foregoing, counsel fees) incurred by it in connection with the administration of the Lloyd's American Trust Fund, and the American Trustee shall have a first lien on the property from time to time comprising the Lloyd's American Trust Fund for any such remuneration and the amount of any such expenses to the extent such remuneration and expenses do not exceed 1% of the value, as at December 31 of the preceding year, of principal and income of the Lloyd's American Trust Fund (which shall be deemed to include the principal and income of the Equitas Trust Fund as at such date to the extent funds were transferred from the Lloyd's American Trust Fund to the Equitas Trust Fund). Nothing in this Article shall entitle the American Trustee to payment or reimbursement from the Lloyd's American Trust Fund of the fees and expenses of the Equitas Trustee or to any indemnity in respect thereof.

NOTE: and see LATD, §18.4.

ARTICLE 14

REMOVAL OR RESIGNATION OF AMERICAN TRUSTEE

- 14.1 Subject to the effective date provisions of this Article, the American Trustee may at any time be removed as trustee and a new American Trustee appointed hereunder by a resolution passed by the Council; provided that any trustee appointed under this Article shall be a bank or trust company organized under the laws of the United States of America or any State thereof and shall be regulated, supervised and examined by United States or State authorities having regulatory authority over banks and trust companies. Upon adoption of any such resolution of appointment, an authorized officer of Lloyd's shall execute such instruments as are necessary or proper for effectuating the appointment of the new American Trustee. Upon the appointment of the new American Trustee, the Lloyd's American Trust Fund shall be transferred to the new American Trustee. The American Trustee may resign at any time by giving written notice addressed to the Chairman of Lloyd's. Such removal or resignation shall take effect on the date specified therein which, in the case of resignation, shall not be less than ninety (90) days from the date the resignation is received at Lloyd's, London. On and after the effective date of such removal or resignation, the sole duty of the former American Trustee shall be to transfer the Lloyd's American Trust Fund to the new American Trustee. The former American Trustee shall, nevertheless, remain

entitled to the settlement of its account and to the payment out of the Lloyd's American Trust Fund of any compensation due to it up to the time of its removal or resignation and any expenses or other disbursements (whether theretofore or thereafter arising) for which it would be entitled to reimbursement from the Lloyd's American Trust Fund if it had not been transferred to the new American Trustee.

ARTICLE 15

NOTICE TO AND COMMUNICATION WITH AMERICAN TRUSTEE

- 15.1 The American Trustee shall be fully protected in relying upon the authenticity of any communication from the Council which purports to be signed by an authorized officer of Lloyd's.
- 15.2 The American Trustee shall also be fully protected and shall incur no liability for any action taken or omitted by it in reliance on any written instrument of any kind believed by it to be genuine and purporting to be signed or sent by the proper person or persons or to have been passed by the proper authorities.
- 15.3 The American Trustee may require that any request made by the Agent under this instrument shall be in writing and filed with the American Trustee at its head office.
- 15.4 The American Trustee shall accept written notice given by the Council as to the identity of the Agent. The American Trustee shall be protected and deemed to have exercised reasonable due care in acting upon any written statement made by the Agent with respect to the authority conferred on it whether directly or indirectly by the Name.
- 15.5 The American Trustee shall be protected in relying upon instructions given by electronic access which the American Trustee believes to be genuine and which purport to be given by the Agent or by the person or persons to whom the Agent has delegated all or any powers of management and investment pursuant to paragraph 7.9 of this Instrument; provided that such instructions by electronic access are accompanied by the codewords furnished (i) by the American Trustee, or (ii) by the Agent by means of the use of the electronic access terminal device, or (iii) by the person or persons to whom the Agent has delegated all or any powers of management and investment pursuant to paragraph 7.9 by means of the use of the electronic access terminal device; and provided further that the American Trustee has not been directed by the Agent or by such person or persons not to recognize such code words.

ARTICLE 16

CERTAIN MATTERS RELATING TO THE EQUITAS TRUST AGREEMENT

- 16.1 Where the American Trustee receives a request to approve the appointment of a successor Equitas Trustee, the American Trustee shall so advise the Council and the Superintendent of Insurance of the State of New York, and shall be fully protected in giving or withholding its consent to such appointment if so directed by the Council.
- 16.2 Where the American Trustee receives a request for its approval as beneficiary under the Equitas Trust Agreement for the transfer of the remaining assets held in the Equitas Trust Fund to the grantor under the Equitas Trust Agreement upon the termination of the Equitas Trust Agreement, the American Trustee shall so advise the Council and the Superintendent of Insurance of the State of New York, and shall be fully protected in giving or withholding such approval if so directed by the Council, provided that, in the event the termination is by the grantor under the Equitas Trust Agreement, the American Trustee shall have received the prior written approval of the Superintendent of Insurance of the State of New York for such termination.

NOTE: see EATD, §13.

- 16.3 Where the American Trustee receives a request for its approval as beneficiary under the Equitas Trust Agreement for the modification, amendment or waiver of any term of the Equitas Trust Agreement, the American Trustee shall so advise the Council and the Superintendent of Insurance of the State of New York, and shall be fully protected in giving or withholding such approval if so directed by the Council, provided that, if directed to give such approval, the American Trustee shall have received the prior written approval of the Superintendent of Insurance of the State of New York for such modification, amendment or waiver.

NOTE: see EATD, §18.

- 16.4 Where the American Trustee receives a request for its approval as beneficiary of any account pursuant to Section 9 of the Equitas Trust Agreement, the American Trustee shall so advise the Council and shall give such approval if so directed by the Council and shall lodge any objection of the Council to any such account with the Equitas Trustee, provided that such objection is in writing and received by the American Trustee not less than five (5) business days prior to the expiration of the period during which objection to such account may be made under the Equitas Trust Agreement. The American Trustee shall be fully protected in giving such approval or lodging such objection if so directed by the Council, and in failing to give such approval or lodge such objection unless timely so directed by the Council.

NOTE: see EATD, §9(f).

- 16.5 Where the American Trustee receives a request under Section 9(p) of the Equitas Trust Agreement for a statement or certificate signed by it (or on its behalf) as beneficiary under the Equitas Trust Agreement, the American Trustee shall so advise the Council and shall be fully protected in giving or withholding such statement or certificate if so directed by the Council.
- 16.6 The foregoing provisions of this Article shall not, in and of themselves, be construed to impose any obligation on the American Trustee, except for the provisions of paragraphs 16.1, 16.2 and 16.3 insofar as they require the American Trustee to advise or obtain the prior written approval of the Superintendent of Insurance of the State of New York of certain matters.

ARTICLE 17

LEGAL ESTATE IN AMERICAN TRUSTEE; REVERSION IN NAME

- 17.1 The legal estate in property from time to time constituting the Lloyd's American Trust Fund shall be vested in the American Trustee, subject only to the execution of the trusts hereunder, and the only right of the Name, his executors or administrators or his or its successors or assigns shall be one in personam against the American Trustee to enforce the performance of the trusts hereunder, and pursuant thereto to receive any balance that may be available after the application of the Lloyd's American Trust Fund to satisfy all liabilities, both actual and estimated, of the Name in respect of American business or for any of the other purposes specified herein.

ARTICLE 18

INADEQUACY OF THE TRUST FUND ASSETS

NOTE: *cf.* similar provisions at (for example) EATD, §12; Lloyd's US Surplus-Lines Common-Use Trust Deed, 4.1 *et seq.*; Lloyd's Credit-for-Reinsurance Common-Use Trust Deed, §4.1 *et seq.*

- 18.1 The Lloyd's American Trust Fund shall be deemed inadequate if:

- (a) the United Kingdom Department of Trade & Industry has ordered that the Lloyd's market cease trading; or
- (b) (i) ERL invokes the "proportionate cover" provisions set forth in the Equitas Reinsurance Agreement; (ii) the proportionate cover rate on American business is less than 100%; and (iii) the claim of any Policyholder that has satisfied all of the conditions set forth in paragraph 5.2 hereof has not been satisfied within one hundred and twenty (120) days of the expiration of the period in paragraph 5.2(D) hereof.

ERL invokes the "proportionate cover" provisions: *cf.* RRC 7, §2.7(c)(i), where proportionate cover protects Equitas Re's relevant assets from attack by Equitas Policyholders Trustee. Neither Equitas Re's actual insolvency nor Proportionate Cover at Equitas Re *per se* triggers the LATF's inadequacy.

the claim of any Policyholder has not been satisfied: *viz.*, such a claim as scaled down by a RRC 4, Sch. 3, §3.1 *etc.* Proportionate Cover Rate: Equitas Re thus has a second chance to pay a relevant claim, this time at the Proportionate Cover Rate.

- 18.2 In the event that the American Trustee receives written notice from the United Kingdom Department of Trade and Industry that it has ordered that the Lloyd's market cease trading or the American Trustee receives written notice from ERL that ERL has invoked the "proportionate

cover” provisions in the Equitas Reinsurance Agreement, the American Trustee shall immediately transmit a written notice of this event to the Superintendent of Insurance of the State of New York.

NOTE: see similarly EATD, §12(b). The trustee’s mere receipt of such notice does not amount to “inadequacy”.

- 18.3 In the event that the Lloyd’s American Trust Fund becomes inadequate as specified in paragraph 18.1(a) or (b), then notwithstanding any other provision in this Lloyd’s American Trust Deed, grounds shall be deemed to exist for the Superintendent of Insurance of the State of New York to obtain from a court of competent jurisdiction an order that, in accordance with Article 74 of the New York Insurance Law, directs the American Trustee to transfer to the Superintendent of Insurance of the State of New York all of the assets of the Lloyd’s American Trust Fund except those assets which are subject to a lien of the American Trustee hereunder. Compliance with such an order shall relieve the American Trustee of all further duties, obligations and liabilities of any kind or description under this Lloyd’s American Trust Deed. Nothing in this paragraph shall be construed as relieving the American Trustee of any liability under this Lloyd’s American Trust Deed for any acts or omissions which occurred prior to the date on which the American Trustee transfers the assets of the Lloyd’s American Trust Fund to the Superintendent of Insurance of the State of New York.

NOTE: Article 74 specifically mentions the Lloyd’s enterprise.² There are similar seizure provisions at EATD, §12(c), Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.4 and Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §4.4.

- 18.4 If the assets of the Lloyd’s American Trust Fund have been transferred to the Superintendent of Insurance of the State of New York pursuant to paragraph 18.3, such assets shall be applied in accordance with the laws of the State of New York applicable to the conservation of insurance companies. If the Superintendent of Insurance of the State of New York determines that the assets of the Lloyd’s American Trust Fund or any part thereof are not necessary to satisfy the Name’s obligations to Policyholders in respect of American business, such assets or part thereof shall be transferred by the Superintendent of Insurance of the State of New York to the American Trustee for application to the payment of any unpaid amounts due to the American Trustee under Article 13. Any remaining assets shall then be transferred by the American Trustee to the Name’s Premium Trust Fund.

NOTE: There are similar distribution provisions at EATD, §12(d), Lloyd’s US Surplus-Lines Common-Use Trust Deed, §4.5 and Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §4.5. Equitas Re’s RRC 4, §3 obligation is deemed discharged to the extent that an EquitasRe-assured-at-Lloyd’s is paid by the NYID: RRC 4, §3.8(b).

ARTICLE 19

MISCELLANEOUS PROVISIONS

- 19.1 The provisions of the Lloyd’s American Trust Deed and the rights of all parties in respect of the Lloyd’s American Trust Fund shall be governed by the laws of the State of New York.

NOTE: see similarly EATD, §14; Lloyd’s US Surplus-Lines Common-Use Trust Deed, §5.1; Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §5.1.

- 19.2 The use herein of one gender shall be deemed to include another and the singular shall be deemed to include the plural, as the context may require.
- 19.3 This Instrument may be executed in any number of counterparts, each of which when signed by or on behalf of the parties hereto, shall be deemed to be an original.

IN WITNESS WHEREOF, the Council of Lloyd’s has executed the foregoing form of Lloyd’s American Trust Deed as a Deed this 7th day of January 1998 and has adopted the same as the amended and restated Lloyd’s American Trust Deed for all Names writing American business effective from and after the 8th day of January 1998, and Citibank, N.A. has accepted the same as American Trustee.

THE COMMON SEAL of Lloyd’s was hereunto affixed in the presence of:

[illegible manuscript signature]

Authorised Signatory

CITIBANK, N.A., now serving as the American Trustee, acknowledges receipt of the amended and

² See p.A189, fn.72.

restated Lloyd's American Trust Deed, signed on January 7, 1998 and effective on January 8, 1998, accepts the terms thereof and acknowledges that it has received the written notice required by Article TWELFTH of the Lloyd's American Trust Deed.

CITIBANK, N.A.

By: [manuscript signature]

PETER VON KAUFMANN

...

Appendix 2.3

Lloyd's American Surplus Or Excess Lines Insurance Joint-Asset Trust Deed

INTRODUCTORY NOTE

A2.3-1 Lloyd's US Surplus-Lines Common-Use Trust Deed — colloquially and misleadingly a “joint asset” trust deed — is discussed elsewhere.¹

¹ See p.109 *et seq.*

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² Editorially added.

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AMENDMENT AND RESTATEMENT LLOYD'S AMERICAN SURPLUS OR EXCESS
LINES INSURANCE JOINT ASSET TRUST DEED DATED SEPTEMBER 15, 1993
(as amended and restated on 7 September, 1995, as further amended by Deed of
Amendment dated 7 February, 1997 and as further amended, with effect from 1 January
1999, by Deed of Amendment dated 17 November 1998)

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This Instrument, dated 7 September, 1995, constituting an amendment and restatement of the Lloyd's American Surplus or Excess Lines Insurance Joint Asset Trust Deed, dated September 15, 1993, has been signed by Lloyd's Signatory on behalf of certain of the Underwriters at Lloyd's, London, and by Citibank, N.A., a national banking association organized and existing under the laws of the United States of America, and having its principal offices at New York, New York ("Trustee"), and has been executed by the Current Contributors to the Trust Fund (who by such execution ratify and confirm the terms of the Trust Agreement dated September 15, 1993 as well as this amendment and restatement thereof) and will in future be executed and acceded to by those persons (whether individuals, bodies corporate or partnerships and whether or not Underwriters at Lloyd's London) who become in the future Current Contributors to the Trust Fund (all persons now or becoming Current Contributors to the Trust Fund to be collectively Grantors of the Trusts hereunder), and this Instrument shall constitute a Deed of Trust, MADE AMONG, (i) Lloyd's, having its principal offices at One Lime Street, London, England, (ii) the Grantors and (iii) the Trustee.

certain of the Underwriters ... Current Contributors: the multiplicity of relevant SYA participants, and the multiplicity of contributors, is characteristic of a dedicated common-use fund. *Cf.* the entirely different configuration of a personal-use fund, which relates to only one particular SYA participant and contains only his own relevant premium and other relevant income: see for example LATD, recital 2. Neither category is actually a party to the deed: *cf.* a personal-use fund deed: see for example LATD, recital 2.

WITNESSETH:³

[1] WHEREAS, Underwriters are or have been engaged in the insurance business in the United Kingdom and have or may have Policyholders in the United States of America as a result of accepting insurance exported to them pursuant to surplus or excess lines laws of the several states covering risks therein; and

NOTE: the Lloyd's enterprise attaches considerable importance to selling in the surplus lines market.⁴

Underwriters: this word distinguishes a common-use fund from a personal-use fund, where the term is "Name" (see for example LATD, recital 1; *ibid.*, §1.16, etc.

[2] WHEREAS, Underwriters have heretofore established a trust fund in the United States as security for said Policyholders and Third Party Claimants and to qualify as an eligible or approved surplus or excess lines insurer therein; and

as security for said Policyholders: the claims payment securitisation provided by Lloyd's US Surplus-Lines Common-Use Trust Fund is specific to certain insurance contracts made pursuant to US state or territorial surplus lines laws: see *ibid.*, §1.1 (definition of "American Policy").

to qualify as an eligible or approved surplus or excess lines insurer: providing claims payment securitisation is a condition of permission to sell in the surplus lines market.

³ [] and numbers in them editorially added.]

⁴ See p.109.

[3] WHEREAS, the Trustee is acting and is willing to continue to act as Trustee of such trust fund; and

NOTE: the Trustee is also trustee of (for example) the LATFs and the Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund.

[4] WHEREAS, the Trustee agrees to maintain and to administer such trust fund principally from its office in The City of New York and the State of New York; and

New York: The Insurance Commissioner of the State of New York has a special regulatory role.⁵

[5] WHEREAS, the Trust Fund now consist of assets valued at a total of not less than the Trust Fund Minimum Amount as defined in Paragraph 2.7 herein, receipt of which the Trustee hereby acknowledges and agrees to hold in trust hereunder; and

Trust Fund Minimum Amount: see elsewhere.⁶

[6] WHEREAS, it is deemed advisable to amend the Agreement dated September 15, 1993 in exercise of the power and in the manner set forth in Paragraph 5.4 of said Agreement; and

[7] WHEREAS, for convenience, said Agreement, as amended, is restated in its entirety as a Deed of Trust;

NOW THEREFORE, the amended and restated Deed of Trust shall provide as follows:

ARTICLE 1

DEFINITIONS

The following terms used herein shall, unless the context otherwise requires, have the following meanings:

1.1 "AMERICAN POLICY" means (i) any contract or policy of insurance issued or any agreement to insure made by one or more Underwriters pursuant to surplus lines or excess lines laws of any state, district, territory, commonwealth or possession of the United States in which Underwriters are not licensed to do an insurance business;

NOTE: for this deed's use, see for example *ibid.*, §§1.3, 1.15, 1.19, 2.3 including *ibid.*, (a) and (e).

provided that, with the exception of such Policies attaching on or prior to November 15, 1995 underwritten under any binding authority incepting prior to August 1, 1995, and subject to (ii) below, such Policies shall not include any contract or policy of insurance (or any agreement to insure) incepting on or after August 1, 1995, which is (or is to be) underwritten by Underwriters on or after August 1, 1995; or (ii) any contract or policy of insurance or any agreement to insure which satisfies the definition of an American Policy as set forth in Lloyd's United States Situs Surplus Lines Trust Deed as prescribed from time to time by Council.

Lloyd's United States Situs Surplus Lines Trust Deed: in this work, "Lloyd's US Surplus-Lines Personal-Use Trust Deed"; the personal-use counterpart to Lloyd's US Surplus-Lines Common-Use Trust Deed. Per *op. cit.*, §1.2: "American Policy" shall mean - (a) any contract or policy of insurance (or any agreement to insure) incepting on or after August 1, 1995 (excluding all contracts or policies of insurance underwritten or any agreement to insure to be underwritten by the Underwriter as a member of the Syndicate under any binding authority incepting prior to that date and attaching on or prior to November 15, 1995) issued to a Policyholder (as defined herein) pursuant to surplus lines or excess lines laws of any state, district, territory, commonwealth or possession of the United States in which some or all of the members of the Syndicate are not at that time licensed to do insurance business (i) which is underwritten by the Underwriter as a member of the Syndicate on or after August 1, 1995, and (ii) which is allocable to the year of account of the Syndicate corresponding to the particular Trust Fund; or (b) any contract or policy of insurance underwritten on or after August 1, 1995, and issued to a Policyholder (as defined herein) pursuant to surplus lines or excess lines laws of any state, district, territory, commonwealth or possession of the United States in which some or all of the members of the Syndicate are not at that time licensed to do insurance business, in respect of which the Underwriter is liable as a member of the Syndicate for the year of account of the Syndicate corresponding to the particular Trust Fund to members of the same Syndicate or any other syndicate for an earlier year of account pursuant to any contract of Reinsurance to Close (as defined herein).'

1.2 "BENEFICIARY" shall mean any Policyholder (as defined herein) and any Third Party Claimant (as defined herein).

NOTE: this deed as extracted does not use "beneficiary" or "Beneficiary" other than in §1.2.

⁵ See p.A187.

⁶ See p.109.

Policyholder: see this deed, §1.15.

Third Party Claimant: see this deed, §1.19.

1.3 “CLAIM” means: (i) a claim against one or more Underwriters by a Policyholder, as defined herein, or Third Party Claimant for a loss under an American Policy excluding punitive or exemplary damages awarded to or against a Policyholder and also excluding any extra contractual obligations not expressly covered by the American Policy (“Loss”); or (ii) a claim against one or more Underwriters by a Policyholder for the return of unearned premium under an American Policy (“Unearned Premium”).

NOTE: for this deed’s use of “Claim” *simpliciter* (cf. “Matured Claim”), see for example *ibid.*, §§1.12, 2.2, 2.3, 2.3(e), 2.4.

excluding punitive or exemplary damages: see similarly Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §1.3. EATD and LATD have no such qualifications. See this deed, §2.3(e). See incidentally RRC 4, §§3.2, 10.1 and 10.2; RRC 5, §2.3. Recovery of punitive damages from Equitas Re personally (if occasioned by the latter’s actionable claims handling) is discussed elsewhere.⁷

1.4 “CONTRIBUTION PERIOD” shall mean each period of time determined by the Council during which each group of Current Contributors is required to maintain the Current Contributions in the Trust Fund.

NOTE: this deed as extracted does not use “Contribution Period” other than in §1.4.

1.5 “COUNCIL” shall mean the Council of Lloyd’s or (in relation to any power or discretion which is hereby vested in the Council but which has for the time being been delegated by the Council to the Committee of Lloyd’s or to the Chairman or a Deputy Chairman of the Committee of Lloyd’s pursuant to the provisions of section 6(6) of Lloyd’s Act 1982) the Committee of Lloyd’s or the Chairman or a Deputy Chairman of Lloyd’s as the case may be or such other person or persons (including Lloyd’s Signatory) as are for the time being authorized by the Council of Lloyd’s to exercise any power or discretion which is hereby vested in the Council.

NOTE: for this deed’s use, see for example *ibid.*, §§1.1, 1.4, 1.5, 1.11, 2.1(a), (b); 2.3, 2.3(f), 2.7, 2.13(a), (b); 4.1(a), (b); 4.2(a), (b); 4.5, 5.4(a), (b).

1.6 “CURRENT CONTRIBUTORS” shall mean those persons (whether individuals, bodies corporate or partnerships and whether or not Underwriters) whose contributions to the Trust Fund constitute the principal of the Trust Fund for the time being, the total amount contributed for the time being to be the “Current Contributions,” and each contribution to the Trust Fund to be a “Current Contribution”.

NOTE: for this deed’s use, see for example heading; §§1.4, 1.11, 2.7, 2.13(b), 4.5. Generally, those SYA participants selling products governed by a dedicated common-use fund are required to make contributions to it.⁸

1.7 “DOMICILIARY COMMISSIONER” shall mean the Chief Regulatory Officer for Insurance of the United States jurisdiction in which the Trust Fund is principally maintained and administered, identified on page one of this Trust Deed.

NOTE: for this deed’s use (cf. “Non-Domiciliary Commissioner”), see for example §§1.14, 2.3, 2.13(b), 4.1(a), (b); 4.2(a), (b); 4.3, 4.4, 4.5, 5.4(b).

1.8 “EFFECTIVE DATE” shall mean with respect to this Instrument the date of execution hereof.

NOTE: for this deed’s use, see for example §§2.3(b), 5.2.

1.9 “IID” shall mean the International Insurers Department of the National Association of Insurance Commissioners (“NAIC”). Decisions under the IID Plan of Operation are made by State Insurance Commissioners acting pursuant to the constitution and bylaws of the NAIC.

NOTE: for this deed’s use, see for example §§2.1(b), 2.3, 2.13(b), 4.1(a), (b); 4.2(a), (b); 5.4(b).

1.10 “LETTER OF CREDIT” means a clean, unconditional, irrevocable letter of credit in favor of the Trustee which satisfies the requirements of New York Insurance Law and which is issued or confirmed by a Qualified United States Financial Institution.

NOTE: this deed as extracted does not use the term other than in this clause. For this deed’s use of “Letters of Credit”, see for example *ibid.*, §2.7.

1.11 “LLOYD’S SIGNATORY” shall mean, in relation to any provision of this Trust Deed, the person or persons for the time being authorized by the Council of Lloyd’s for that purpose and designated in

⁷ See p.A57.

⁸ Common-use funds are treated in detail at *Astor’s Law of Lloyd’s*, 2nd Ed.

writing to the Trustee (pursuant to authority given by the Underwriters) to act on behalf of Underwriters and Current Contributors under this Trust Deed and to give or receive any notice or certification to Underwriters and Current Contributors under this Trust Deed.

NOTE: for this deed's use, see for example heading; §§1.5, 2.3, 2.7.

1.12 "MATURED CLAIM" means a Claim which is enforceable against the Trust Fund as provided for in Paragraph 2.3 of this Trust Deed.

NOTE: for this deed's use, see for example *ibid.*, §§2.2, 2.3, 2.4, 4.1(b), 4.3.

1.13 "MEMBERS' AGENT" shall mean an underwriting agent which is listed as a members' agent on the Lloyd's register of underwriting agents.

NOTE: this deed as extracted does not use the phrase other than in §1.13.

1.14 "NON-DOMICILIARY COMMISSIONER" shall mean the Chief Regulatory Officer for Insurance other than the Domiciliary Commissioner in any state, territory, district, commonwealth or possession of the United States in which the Underwriters have Policyholders and who has provided the Trustee with written notice that he or she requires any notification required to be made to the Domiciliary Commissioner pursuant to this Deed of Trust.

NOTE: for this deed's use, see for example *ibid.*, §§2.3, 2.13(b), 4.1(a), (b); 4.2(a), (b); 5.4(b).

1.15 "POLICYHOLDER" for the purposes of this Trust Deed, shall mean the holder of an American Policy resident or doing business in the United States, and any other persons or associations who are assignees, pledgees, or mortgagees named therein.

NOTE: for this deed's use, see for example *ibid.*, recital [1], [2]; §§1.2, 1.3, 1.14, 2.3, 2.3(a), (d), (e); 2.4, 4.5. See similarly Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §12 (definition of "Ceding Insurers"). Cf. the non-territorial approach at (for example) EATD, §1 (definition of Policyholder"), LATD, §1.19 (definition of "Policyholder").

...

1.19 "THIRD-PARTY CLAIMANT" is one not a party to the insurance contract but having a final judgment or arbitration award against Underwriters for Claims or Loss covered by an American Policy.

NOTE: for this deed's use, see for example *ibid.*, §2.3(a), (e).

...

1.21 "TRUST FUND" or "TRUST" means the property in the actual and sole possession of the Trustee and held under the provisions of this Trust Deed.

NOTE: for this deed's use of "Trust Fund", see for example *ibid.*, heading; recital [5]; §§1.4, 1.6, 1.7, 1.12, 2.1, 2.1(b), 2.2, 2.3, 2.4, 2.7, 2.13(b), 4.1, 4.1(b), 4.2(b), 4.3, 4.4, 4.5, 5.1. For this deed's use of "trust fund", see for example *ibid.*, recital [2], [3], [4]. And see this deed's term "Trust Fund Minimum Amount", defined at *ibid.*, §2.7.

1.22 "UNDERWRITERS" shall mean for purposes of this trust Deed, underwriters at Lloyd's London and such former underwriters at Lloyd's London as continue to have underwriting business at Lloyd's not fully wound up and the personal representatives or trustee in bankruptcy of any such underwriter or former underwriter who has died or become bankrupt.

NOTE: for this deed's use, see for example *ibid.*, §§1.3, 1.6, 1.11, 1.14, 1.19, 1.22, 2.1(b), 2.3, 2.3(a), (d); 2.7, 4.1(b), 4.2(a), (b); 5.3.

such former underwriters at Lloyd's London as continue to have underwriting business at Lloyd's not fully wound up: viz., presumably, relevant SYA participants who have been conventionally outward-RTCD in relation to relevant outstanding liabilities.

...

ARTICLE 2

THE TRUST

2.1 Duration of the Trust Fund. The Trust Fund shall be irrevocable and remain in full force and effect for a period of at least five years and may be terminated only upon the occurrence of any of the following events:

- (a) the passage of five (5) years from the date of written notice from the Council to the Trustee of the termination of the Trust.
- (b) the expiration of sixty (60) days after the Council has sent written notice to the Trustee by certified mail return receipt requested that all Underwriters (i) have become qualified and licensed to conduct an insurance business in all States where they have direct insurance in force; or, (ii) have entered into an assumption and assignment agreement creating a novation that transfers all liability with respect to all risks covered by this Trust Fund to an insurer licensed to do an insurance business in such states or an insurer listed by the IID. Such written notice submitted to the Trustee by the Council shall include a list of all states in which Underwriters have American Policies in force as certified by the Council or Underwriters' U.S. Representative. The Trustee shall notify IID and the Insurance Commissioners of said States in writing of its receipt of a notice as provided for in Subparagraphs (a) or (b) of this paragraph within thirty (30) days of receipt of such notice from the Council.

2.2 Priority of Payments Out of the Trust Fund. The Trust Fund shall be exclusively available first for the payment of all expenditures and fees under Paragraph 3.9 of this Trust Deed including legal fees and expenses actually incurred by or on behalf of the Trustee in connection with its administration, preservation or conservation of the Trust ("Trustee Priority Claims"); provided, however, that this amount shall not exceed \$4,000,000 or 4% of the value of the Trust, whichever is less. Any amount in excess of the amount necessary to satisfy Trustee Priority Claims shall be available for the payment of Matured Claims, provided, however, that Losses shall always take priority over Unearned Premium in the payment of claims so that the Trustee shall pay all Matured Claims for Losses in full prior to payment of any part of a Matured Claim for Unearned Premium. The Trustee shall pay a Matured Claim for Unearned Premium after receipt of a Claim for Losses which has not yet become a Matured Claim for any reason.

2.3 When Claims Become Enforceable Against the Trust Fund. Subject to the payment of Trustee Priority Claims and to the priority of Losses over Unearned Premium, a Claim against any of the Underwriters shall be enforceable against the Trust Fund when all of the following six conditions have been satisfied:

Against the Trust Fund: viz., not against any SYA participant: the trust fund itself is directly accessible. See similarly LATD, §5.2; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.3.

- (a) The Policyholder or Third-Party Claimant has obtained a judgment against that Underwriter in any court of competent jurisdiction within the United States of America, its territories or possessions or has obtained a binding arbitration award, in respect of that Underwriter's liability under an American Policy;

within the United States of America: had the deed used EATD "American Business" or LATD "American business" (see particularly LATD, §5.2(A)), this might have been an imposition.

arbitration award: cf. Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, which has no such express provision.

- (b) such judgment or award has become final in the sense that the particular litigation or arbitration has been concluded, either through failure to appeal within the time permitted therefor or through final disposition of any appeal or appeals that may be taken, the word "appeal" being used herein to include any similar procedure for review permitted by applicable law;
- (c) the service upon the Trustee of a certified copy of said judgment or award, together with such proof as to its finality as the Trustee may reasonably request;
- (d) receipt of a written statement under oath from the Policyholder's or Third Party Claimant's legal counsel stating, without qualification, that the Policyholder and/or Third Party Claimant has pursued all rights and remedies against that Underwriter under deeds of trust (as amended from time to time) known as The Lloyd's American Trust Deed, Lloyd's Central Fund United States Trust

Deed, Lloyd's Central Fund United States Trust Deed (Number 2) and Lloyd's United States Situs Surplus Lines Trust Deed, or any replacement for said trusts, and that the amount of the Policyholder's and/or Third Party Claimant's claim against this Trust is limited to the amount of its total claim which remains unsatisfied after all recourse to such other trusts has been exhausted;

The Lloyd's American Trust Deed: viz., the LATD.

Lloyd's Central Fund United States Trust Deed: viz., Central Fund US TD 1.

Lloyd's Central Fund United States Trust Deed (Number 2): viz., Central Fund US TD 2.

Lloyd's United States Situs Surplus Lines Trust Deed: viz. a form of Lloyd's US Surplus-Lines Personal-Use Trust Deed.

- (e) receipt of a written statement under oath from the Policyholder's or Third Party Claimant's legal counsel stating, without qualification other than with respect to the passage of the time period described in Paragraph 2.3(f) hereof, that the Claim does not include exemplary or punitive damages or any extra contractual obligations not expressly covered by the American Policy, the portion of the Claim that is designated for Unearned Premium, if any, and that the Policyholder or Third-Party Claimant has complied with all of the provisions set forth in Subparagraphs (a), (b), (c) and (d) of this paragraph; and

does not include exemplary or punitive damages: and see this deed, §1.3 (definition of "Claim"). See similarly Lloyd's US Credit-for-Reinsurance Trust Deed, §2.3(e). LATD contains no such limitation: see LATD, §5.2. Equitas Re's RRC 4, §3 Reinsurance Obligation does extend to punitive and penal damages: *ibid.*, §3.2; and see similarly Equitas Ltd.'s RRC 5, §2.3 Retrocession Obligation.

- (f) the expiration of a period of thirty (30) days from the date of the service upon the Trustee of said certified copy of said judgment and all of said proofs without the Trustee having received notice from the Council that such judgment has been satisfied; provide, however, that in the event that the termination date of the Trust is less than thirty (30) days following such date of service, the expiration of the period of time equal to the amount of time left before the day before the termination date of the Trust.

A Claim which has satisfied each of the above six conditions shall be deemed to be a Matured Claim. The Trustee shall determine that the above conditions have been met on the basis of the evidence specified above and shall be held harmless in relying upon such evidence in its determination provided, however, that the Trustee may rely upon a determination by the Council that a particular judgment or award relates to liability under an American Policy. If the Council does not furnish such determination to the Trustee at least 10 days prior to the expiration of the period described in Paragraph 2.3(f), then such judgment or award shall be deemed to relate to liability under an American Policy. If the Council determines that such judgment or award does not relate to liability under an American Policy, the Council shall notify the Trustee of such determination at least 10 days prior to the expiration of the period described in Paragraph 2.3(f) where upon the Trustee shall notify the Domiciliary Commissioner of such determination by the Council. The Domiciliary Commissioner shall thereupon determine and notify the Council and the Trustee whether such judgment or award relates to liability under an American Policy and such determination shall be conclusive and binding upon all parties. The Council may at any time notify the Trustee if such claim has been satisfied prior to the expiration of the period set forth in subparagraph (e) above. Any Matured Claim shall, subject to Article 4, be paid by the Trustee by check mailed to the address of the Policyholder or Third Party Claimant solely out of the Trust Fund then in its actual and sole possession, without regard to the rights of any other Policyholder unless the judgment or award shall be with respect to a Matured Claim for return of Unearned Premium, in which case payment by the Trustee shall be made in accordance with the priorities stated above in Paragraph 2.2. The Trustee shall promptly notify Lloyd's Signatory in writing of the receipt of a Claim which has been determined by the Trustee to meet conditions (a) through (e) of this paragraph and of the amount thereof. If a Matured Claim would, if paid, reduce the Trust Fund below the Trust Fund Minimum Amount as defined in Paragraph 2.7, or, if the Trustee has received notice that the Lloyd's market has ceased trading as set forth in Paragraph 4.1, then Article 4 shall govern the distribution of the Trust Fund. A Matured Claim which, if paid, would reduce the amount of the Trust Fund below the Trust Fund Minimum Amount shall only be paid in accordance with the provisions of Article 4 of this Trust Deed. The Trustee shall notify the IID and the Domiciliary Commissioner and the Non-Domiciliary Commissioner within ten (10) days of the Trustee's determination that a Claim constitutes a Matured Claim that would reduce the Trust Fund below the Trust Fund Minimum Amount as set forth in Paragraph 2.7. In determining whether payment of a Matured Claim would reduce the amount of the Trust Fund below the Trust Fund

Minimum Amount, the Trustee shall rely upon the value of the Trust Fund as established at its most recent valuation as provided for in Paragraph 2.13 of this Trust Deed.

2.4 Limitations of Policyholder's Source of Recovery. No Policyholder or Third Party Claimant shall have any right of any nature or description under this Trust Deed to seek to enforce a Claim or otherwise bring an action against the Trustee in respect of any assets of the Trustee or of any assets other than those in the Trust Fund. No Policyholder or Third Party Claimant, even after its Claim has become a Matured Claim, may require an accounting from the Trustee or inquire into the administration of the Trust, question any of the Trustee's acts or omissions or otherwise enforce this Trust Deed, the sole right of such Policyholder or Third Party Claimant under this Trust Deed being to receive the amount of its Claim after it has become a Matured Claim from the assets then in the Trust Fund and available for such payment under this Trust Deed.

...

2.7 Trust Fund Minimum Amount. The Council shall provide the Trustee with written notice of the minimum amount which Underwriters are required by law to maintain in the Trust Fund ("Trust Fund Minimum Amount"). The Council may amend the Trust Fund Minimum Amount from time to time by providing the Trustee with advance written notice thereof. In no event, however, may the Trust Fund Minimum Amount be less than \$104,000,000. In the event that the Council shall fail to provide the Trustee with written notice of the Trust Fund Minimum Amount such amount shall be deemed to be \$104,000,000. Current Contributors (acting through Lloyd's Signatory) reserve the right at their sole option to substitute cash in U.S. currency or specifically designated Readily Marketable Securities and/or Letters of Credit for any cash or assets then forming part of the Trust Fund; provided, however, that the amount of cash and/or other assets and the market value at the time of substitution of the investments so substituted shall not decrease the value of the Trust Fund below the Trust Fund Minimum Amount. The value of any substituted assets shall be as determined by the Trustee at the time of substitution in accordance with general business practices as determined in the discretion of the Trustee.

...

2.13 Trustee to Certify Trust Assets.

- (a) Whenever reasonably required by the Council, but not less often than annually and not more often than quarterly, Trustee shall prepare and submit to the Council a statement of the assets in the Trust and such other information as may be agreed upon between the Council and the Trustee.

NOTE: no "as at" date is specified.

- (b) Trustee shall promptly certify the existence of the Trust Fund and the assets and their market valuation on the Effective Date of this Instrument and quarterly thereafter, to the IID and the Domiciliary Commissioner; such notification shall be made within thirty (30) days after the end of each calendar quarter. In addition, Trustee shall certify the existence and most recent value of the Trust Fund whenever so directed by the IID, the Council, the Domiciliary Commissioner or any Non-Domiciliary Commissioner. Whenever the Trustee in the performance of its duties hereunder shall be required to value the assets of the Trust Fund, it may employ an agent for such valuation and Current Contributors shall reimburse Trustee for any costs or expenses of valuations performed either by the Trustee or such agent. In the absence of the filing in writing with the Trustee by the Council of exceptions to any such statement within sixty (60) days, approval of such statement shall be deemed to have been given; and in such case or upon written approval, the Trustee shall be released, relieved and discharged by the Agent with respect to all matters set forth in such statement.

...

ARTICLE 4

INSOLVENCIES

NOTE: cf. similar provisions at (for example) EATD, §12; LATD, §18.1 *et seq.*; Lloyd's Credit-for-Reinsurance Common-Use Trust Deed, §4.1 *et seq.*

4.1 When Trust Fund Becomes Insolvent. The Trust Fund shall be deemed insolvent upon the happening of the earlier of the following events:

- (a) the Trustee actually receives written notice from the Council, the United Kingdom H. M. Treasury or Financial Services Authority, the Domiciliary Commissioner, any Non-Domiciliary Commissioner or the IID, that the Lloyd's market has ceased trading; or
- (b) the expiration of sixty (60) days after the value of the Trust Fund as shown by the most recent valuation of the Trust Fund as provided for in Paragraph 2.13 of this Trust Deed (i) was reduced below the Trust Fund Minimum Amount as specified in accordance with Paragraph 2.7 or (ii) would be so reduced by the payment of a Matured Claim, whichever of the events described in (i) and (ii) occurs first. If said minimum has been replenished within said sixty (60) day period by or on behalf of Underwriters to offset any such reduction, notice thereof shall be given by the Trustee to the IID as provided below, and the insolvency shall be deemed cured. Promptly after such actual or anticipated reduction of the value of the Trust Fund, the Trustee shall send notice to the Council of the actual or anticipated reduction and a copy of such notice by certified mail return receipt requested, to the Domiciliary Commissioner, all Non-Domiciliary Commissioners and the IID.

NOTE: Equitas Re is not mentioned: its insolvency has no relevance whatever to the fund's own insolvency. *Cf.* LATD, §18.1(b).

4.2 Notice of Insolvency

- (a) If the Lloyd's market ceases trading, the Council shall promptly (i) transmit a written notice of this event and (ii) send a certified copy of such declaration by certified mail return receipt requested to Underwriters' U.S. representative, the Trustee, the Domiciliary Commissioner, all Non-Domiciliary Commissioners and the IID.
- (b) If the Trust Fund is deemed insolvent as defined in Paragraph 4.1, the Trustee shall promptly transmit a written notice of this event by certified mail return receipt requested to the Council, Underwriters' U.S. Representative, the Domiciliary Commissioner, all Non-Domiciliary Commissioners and the IID.

4.3 One-Year Waiting Period After Insolvency. Except in cases where Trust assets have been transferred to the Domiciliary Commissioner or other designated Receiver as provided for in Paragraph 4.4 and unless otherwise ordered by a court of competent jurisdiction, no Claims, other than the Trustee's Priority Claims, shall be paid out of the Trust Fund during the 12-month period ("Waiting Period") commencing on the date the Trustee receives written notice that the Lloyd's market has ceased trading as set forth in Paragraph 4.1(a) or the date the Trustee is required to transmit a notice to the Agent pursuant to Paragraph 4.1(b), unless the insolvency has been cured within the sixty (60) day period as provided for in Paragraph 4.1(b), whichever occurs first. Matured Claims, whether arising prior to or during the Waiting Period, may be filed throughout said period by certified mail return receipt requested.

4.4 Transfer of Trust Assets to Domiciliary Commissioner in Event of Insolvency. In the event that the Trust becomes insolvent as specified in Paragraph 4.1 and notwithstanding the provisions of this Article 4 or of any other provision in this Trust Deed, the Trustee shall comply with an order of the Domiciliary Commissioner or U.S. court of competent jurisdiction directing the Trustee to transfer to the Domiciliary Commissioner or other designated Receiver all of the assets of the Trust Fund except those assets which are necessary to satisfy the Trustee's Priority Claims as determined in Articles 2.2 and 3.9 or to reimburse the Trustee for funds or securities advanced pursuant to Paragraph 3.18. The Domiciliary Commissioner or other designated Receiver shall distribute assets transferred from the Trust in compliance with applicable state law. Compliance with such an order shall relieve the Trustee of all further duties, obligations and liabilities of any kind or description under this Trust Deed. Nothing in this paragraph shall be construed as relieving the Trustee of any liability under this Trust Deed for any acts or omissions which occurred prior to the date on which the Trustee transfers the assets of the Trust Fund to the Domiciliary Commissioner.

NOTE: there are similar seizure provisions at EATD, §12(c); LATD, §18.3; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.4.

4.5 Distribution of Trust Fund Assets. If the assets of the Trust have been transferred to the Domiciliary Commissioner pursuant to Paragraph 4.4, hereof, such assets shall be applied in accordance with the laws of the State of New York applicable to the liquidation of insurance companies. If the Domiciliary Commissioner determines that such assets, or any portion thereof, are not needed to satisfy the Claims of

Policyholders, the Domiciliary Commissioner shall distribute such assets or such portion of such assets to the Trustee for application to the payment of any outstanding and unpaid Trustee Priority Claims. Any remaining assets after payment of all outstanding Trustee Priority Claims shall then be transferred by the Trustee to Current Contributors, in shares bearing the same ratio to the total amount payable as the total Current Contributions of or attributable to each Current Contributor bears to the total of Current Contributions, as directed by the Council.

NOTE: there are similar distribution obligations at EATD, §12(d); LATD, §18.4; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.5. Equitas Re's RRC 4, §3 obligation is deemed discharged to the extent that an EquitasRe-assured-at-Lloyd's is paid by the NYID: RRC 4, §3.8(b).

ARTICLE 5

MISCELLANEOUS

5.1 Governing Law. This Trust Deed shall be governed by, and construed and enforced in accordance with, the laws of the United States jurisdiction in which the Trust Fund is principally administered as specified on page one of this Trust Deed.

NOTE: see similarly EATD, §14; LATD, §19.1; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §5.1.

5.2 Survival of Prior Obligations. Commencing on the Effective Date, this Trust Deed shall be binding upon the parties hereto and their successors and assigns and shall supersede such prior agreements, except for continuing obligations created by any prior agreements between the parties on the subject matter hereof as to matters arising prior to the Effective Date.

5.3 Survival of Individual Liability of Underwriters. Nothing in this Trust Deed shall affect or limit Underwriters' obligation to make payment of insurance claims against them.

5.4 Procedure to Be Followed in Amending this Deed of Trust.

- (a) The Council shall have power in its discretion to propose to amend this Deed of Trust; provided that no amendment increasing the duties of the Trustee or reducing the rights and protections of the Trustee shall be binding upon the Trustee without the Trustee's written consent. All amendments to this Deed of Trust shall be in writing and signed on behalf of the Council.
- (b) No amendment shall become effective without the prior written consent of the Superintendent of Insurance of the State of New York and the IID. The Council shall give written notice of any proposed amendment to the Trustee and shall direct the Trustee to give written notice to all Domiciliary and Non-Domiciliary Commissioners together with a copy of the proposed amendment. A proposed amendment shall be effective on the date specified by the Superintendent of Insurance of the State of New York unless the Trustee receives notice that a Commissioner disapproves the proposed amendment within thirty (30) days of receipt of the notice by such Commissioner.

...

Appendix 2.4

Lloyd's American Credit For Reinsurance Joint Asset Trust Deed

INTRODUCTORY NOTE

A2.4-1 The significance of credit-for-reinsurance claims payment securitisation has been contemporaneously explained.¹ Typically the reinsurance slip will identify the US cedant.² The Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed is closely similar to Lloyd's US Surplus-Lines Common-Use Trust Deed.

¹ See contemporaneously for example Market Bulletin Y473, December 20, 1996 ("USA: credit for reinsurance placed with Lloyd's"). *Ibid.*, p.1:-

As at year-end 1995 Lloyd's enjoyed 'accredited reinsurer' status in all states except Michigan, with the result that US-based cedants in these states were able to take credit, in their Annual Statement, for the outstanding liabilities recoverable from Lloyd's. It has become clear that a handful of states have yet to complete their approval process for year-end 1996. Two states in particular, Arizona and Kansas, have stated that, unless Lloyd's can persuade them to the contrary, they will no longer permit credit to be taken for any reinsurance placed with Lloyd's by cedants domiciled in their states, unless supported by a letter of creditor funds withheld arrangement. We are in discussion with the insurance departments of both states, stressing to them the positive impact both of the Equitas transaction, and of the new US Credit for Reinsurance Trust established in August 1995.

See similarly contemporaneously Market Bulletin Y256, June 25, 1996 ("US trading instructions"). *Ibid.*, p.1:-

[I]n the reinsurance trust fund, Lloyd's has to reserve for any US reassured that is claiming credit in their filing with the NAIC or with their individual state. It is therefore important that, in the absence of a NAIC company code, we can properly identify the reassured as the items still have to be reported and reserved for.

² The reinsurance slip must show the US reinsured's NAIC code: see for example contemporaneously Market Bulletin Y256, June 25, 1996 ("US trading instructions"), p.1 ("It is essential that all reinsurance transactions subject to the new US trading arrangements show the reassured's NAIC code. Many slips are being presented to LPSO without the NAIC code clearly shown. Nearly all US insurers are required to file financial statements with the NAIC and therefore are allocated an NAIC code.")

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AMENDMENT AND RESTATEMENT
LLOYD'S AMERICAN CREDIT FOR REINSURANCE
JOINT ASSET TRUST DEED DATED SEPTEMBER 15, 1993
(as amended and restated on 7 September, 1995
and as further amended by Deed of Amendment dated 7 February, 1997)

[This version is MGTA\US\TDS\CRJATD97. Where this deed is closely similar to Lloyd's US Surplus-Lines Common-Use Trust Deed, see the latter for more extensive annotations.]

This instrument, dated 7 September, 1995, constituting an amendment and restatement of the Lloyd's American Credit For Reinsurance Joint Asset Trust Deed dated September 15, 1993, has been signed by Lloyd's Signatory on behalf of certain of the Underwriters at Lloyd's, London and by Citibank, N.A., a national banking association organized and existing under the laws of the United States of America, and having its principal offices at New York, New York ("Trustee"), and has been executed by the Current Contributors to the Trust Fund (who by such execution ratify and confirm the terms of the Trust Agreement dated September 15, 1993 as well as this amendment and restatement thereof) and will in future be executed and acceded to by those persons (whether individuals, bodies corporate or partnerships and whether or not Underwriters at Lloyd's London) who become in the future Current Contributors to the Trust Fund (all persons now or becoming Current Contributors to the Trust Fund to be collectively Grantors of the Trusts hereunder), and this Instrument shall constitute a Deed of Trust MADE AMONG, (i) Lloyd's, having its principal offices at One Lime Street, London, England, (5) the Grantors and (iii) the Trustee.

WITNESSETH:⁴

[1] WHEREAS, Underwriters are or have been engaged in the insurance business in the United Kingdom and have or may have obligations to United States insurers as a result of reinsurance ceded by such ceding insurers to Underwriters; and

[2] WHEREAS, Underwriters have heretofore established a trust fund in the United States as security for said ceding insurers and to qualify as an approved or accredited reinsurer under the laws of the various jurisdictions in the United States; and

[3] WHEREAS, the Trustee is acting and is willing to continue to act as Trustee of such trust fund; and

[4] WHEREAS, the Trustee agrees to maintain and to administer such trust fund principally from its office in the City of New York and the State of New York; and

[5] WHEREAS, the Trust Fund now consists of assets valued at a total of not less than the Trust Fund Minimum Amount as defined in Paragraph 2.7 herein, receipt of which the Trustee hereby acknowledges and agrees to hold in trust hereunder; and

[6] WHEREAS, it is deemed advisable to amend the Agreement dated September 15, 1993 in exercise of the power and in the manner set forth in Paragraph 5.4 of said Agreement; and

[7] WHEREAS, for convenience, said Agreement, as amended, is restated in its entirety as a Deed of Trust;

NOW THEREFORE, the amended and restated Deed of Trust shall provide as follows:

⁴ [] and numbers in them editorially added.]

Lexicon of Definitions

The Lexicon of Definitions collates and juxtaposes some principal terms in (for example) RRCs 1, 4, 5, 7 and 17, and EATD, LATD, Lloyd's US Surplus-Lines Common-Use Trust Deed and Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed. Annotations can be found at this Edition's relevant Appendix.

I

1992 and Prior Business — (1) **RRC 1, Sch. 1, §1:** all liabilities under contracts of insurance (whether direct or otherwise) or reinsurance underwritten at Lloyd's (other than long term business as defined in the Insurance Companies Act 1982) and originally allocated to the 1992 year of account or any earlier year of account including, without limitation, any such liabilities reinsured to close into the 1993 or any later year of account, but excluding any liabilities re-signed, or reallocated pursuant to a premium transfer, into the 1993 or later year of account (2) **RRC 4, Sch. 2, §1:** all liabilities under contracts of insurance underwritten at Lloyd's (other than life business) and originally allocated to the 1992 year of account or any earlier year of account including, without limitation, any such liabilities reinsured to close into the 1993 or any later year of account but excluding any liabilities re-signed, or re-allocated pursuant to a premium transfer, into the 1993 or any later year (3) **RRC 7, §1.1:** all liabilities under contracts of insurance underwritten at Lloyd's (other than life business) and originally allocated to the 1992 year of account or any earlier year of account including, without limitation, any such liabilities reinsured to close into the 1993 or any later year of account but excluding any liabilities re-signed, or re-allocated pursuant to a premium transfer, into 1993 or any later year (4) **EATD, §1:** any liabilities under contracts of insurance (whether direct or otherwise) or reinsurance underwritten at Lloyd's (other than long term business as defined in the Insurance Companies Act (U.K.) 1982 or by a later similar statute) and originally allocated to the 1992 Year of Account or any earlier Year of Account including, without limitation, any such liabilities reinsured to close into the 1993 or any later Year of Account excluding any liabilities re-signed, or reallocated pursuant to a premium transfer, into the 1993 or later Year of Account (5) **LATD, §1.1:** any liabilities under contracts of insurance (whether direct or otherwise) or reinsurance underwritten at Lloyd's (other than long term business as defined from time to time by the Insurance Companies Act (U.K.) 1982 or by a later similar statute) and originally allocated to the 1992 Year of Account or any earlier Year of Account including, without limitation, any such liabilities reinsured to close into the 1993 or any later Year of Account but excluding any liabilities re-signed, or reallocated pursuant to a premium transfer, into the 1993 or later Year of Account [*see Syndicate 1992 and Prior Business*]

A

Accepting Name — (1) **RRC 1, Sch. 1, §1:** a Name who has accepted the Settlement Offer in accordance with the terms set out in the Settlement Offer Document, but not in any other capacity (including, without limitation, as an E&O Insurer or PSL Insurer) (2) **RRC 4, Sch. 2, §1:** a Name who has accepted or accepts the Settlement Offer in accordance with the terms set out in the Settlement Offer Document [*see Name, Names*]

Accepting Name's Claim — **RRC 1, Sch. 1, §1:** a Claim by an Accepting Name (whether directly, or by or through an Action Group for his benefit, on his behalf or otherwise) howsoever arising out of, or in any way related to or connected with, whether directly or indirectly, an Accepting Name's recruitment to underwrite insurance business at Lloyd's through, or his membership at any time of, or the management of one or more Syndicates for the 1992 year of account or any earlier year of account (excluding for this purpose long term business, as defined in the Insurance Companies Act 1982, underwritten by such Syndicates) and/or his 1992 and Prior Business (including the management thereof except that an Accepting Name's Claim for this purpose shall not include: (a) a Claim in respect of the

benefit of any insurance or reinsurance contract which an Accepting Name may have entered into in his personal capacity to protect himself or his estate from loss from any cause (including without limitation, under any PSL or EPP Contract); (b) a Claim against an Auditor in respect of any advice, whether financial or otherwise, given or which should have been given to an Accepting Name in his personal capacity and not as a member of one or more Syndicates, except that this exclusion shall not extend to Claims for the recovery of any underwriting losses for 1992 and Prior Business in respect of advice or information given, or which should have been given, to the extent that that advice or information or the absence thereof influenced an Accepting Name's decision to become a member of Lloyd's, or choice of Syndicates, or level of participation on particular Syndicates or his decision to continue on particular Syndicates or as a member of Lloyd's; (c) an application made on or before 4 April 1996 for compensation under the Members' Compensation Scheme Byelaw (No. 15 of 1989), except that this exclusion shall not extend to any such application which relates to any Syndicate year of account in respect of which an Accepting Name is receiving the benefit of an allocation from the Combined Litigation Settlement Funds; (d) a Claim against an Underwriting Agent in respect of any failure by that Underwriting Agent to give instructions, make demand or take any other steps which it is or was within the power of that Underwriting Agent to take, which are necessary to facilitate the payment of an Accepting Name's Equitas Premium or any other liability covered by his Finality Statement; (e) an Equitas Claim; and (f) a Claim under the Reinsurance Contract or under any of the Equitas Documents against any party thereto

Actual Insurance Creditor — RRC 4, Sch. 2, §1: any Insurance Creditor in respect of whom any Claim is outstanding [*see* **Contingent Insurance Creditor**, **General Creditor**, **Insurance Creditor**]

Additional Effective Date — RRC 5, Sch. 1, §1: in respect of any Additional Reinsurance Contract, the date on which such contract becomes wholly unconditional [*see* **Effective Date**]

Additional Persons — RRC 1, Sch. 1, §1: to the extent they were acting in such capacity: (a) the members of the Reserve Groups and the past and present advisers, lawyers, consultants (including self-employed contractors) and secondees to the Reserve Groups, including each of their past and present directors, officers, partners, associates and employees; (b) the members of the Names Committee; (c) the members of the Settlement Allocation Advisory Committee; (d) the members of the Validation Steering Group and the past and present partners and employees of Slaughter and May in their capacity as advisers to the Validation Steering Group; (e) the members of the Settlement Agreement Review Group and the past and present partners and employees of Wilde Sapte in their capacity as advisers to the Settlement Agreement Review Group; and (f) the Neutral Evaluator

Additional Reinsurance Contracts — RRC 5, Sch. 1, §1: any contract of reinsurance underwritten by ERL other than the Initial Reinsurance Contracts [*see* **Reinsurance Contract**]

Additional Retrocession Consideration — RRC 5, Sch. 1, §1: in respect of any Additional Reinsurance Contract, the consideration agreed between ERL and Equitas for the retrocession of liabilities under such Additional Reinsurance Contract to Equitas [*see* **Retrocession Consideration**]

Adjustment Entitlement — (1) RRC 4, Sch. 2, §1: the right of a Reinsured Name, if there is a Trigger Event leading to an upward adjustment of a Retrocession Rate, to receive compensation in accordance with paragraph 13 of schedule 3 (2) RRC 5, Sch. 3, §17: the right of ERL, if there is a Trigger Event leading to an upward adjustment of a Retrocession Rate, to receive (i) compensation in accordance with paragraph 13 of this schedule; and (ii) any entitlement to an increased Retrocession Rate in accordance with paragraph 2.1(b)

Affiliate — EATD, §1: with respect to any person, a person which directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such person

Agent — LATD, §1.2: (A) in relation to any matter not falling within (B), any one or more of: (i) the Name's Members' Agent at Lloyd's; (ii) any agent appointed by the Name and any agent appointed by the Name's Members' Agent in exercise of any authority given by the Name (or appointed by any agent or sub-agent of the Members' Agent acting under any such authority or delegation of such authority) to act as an agent or sub-agent of the Name for the purpose of conducting all or any part of the Name's underwriting business and any successor thereto acting, or any substitute agent appointed by the Council in place of any such agent in respect of the Name; (iii) any Regulating Trustee; (B) on

or at any time after the date and time of fulfillment of the last of the conditions set out in clause 2.1 of the Equitas Reinsurance Agreement to be fulfilled, in relation to the performance of any function or discharge of any liability in respect of 1992 and Prior Business which Equitas Reinsurance Limited (“ERL”) is authorized or required by the Equitas Reinsurance Agreement to perform or discharge and in relation to the giving of Withdrawal Notices, ERL, Equitas Limited (“EL”), or any person appointed, directly or indirectly, to act on behalf of either; and (C) as respects either (A) or (B), any Representative of the Agent

American business — LATD, §1.3: such part of the Name’s underwriting business at Lloyd’s (other than long term business as defined from time to time by the Insurance Companies Act, (U.K.) 1982 or by a later similar statute) as complies with the following two conditions: (i) the liability of the Name in respect thereof is expressed in U.S. dollars; and (ii) the premium payable to or for the account of the Name has been paid or is payable in U.S. dollars; excluding all such business as comprises any contract or policy of insurance or reinsurance underwritten or incepting on or after August 1, 1995 except for: (a) contracts or policies underwritten under a binding authority incepting prior to that date; (b) contracts or policies of insurance written pursuant to Lloyd’s license in Kentucky prior to January 1, 1996; and (c) any contract of Reinsurance to Close for any Year of Account underwritten by the Name to the extent only that: (i) the premium payable to or for the account of the Name has been paid or is payable in U.S. dollars or the liability of the Name in respect of such contract is expressed in U.S. dollars; and (ii) the Name is liable under such contract in respect of contracts or policies of insurance or reinsurance underwritten by Underwriting Members of Lloyd’s which either (1) incepted prior to August 1, 1995; (2) were underwritten under a binding authority incepting prior to that date; or (3) were underwritten pursuant to Lloyd’s license in Kentucky prior to January 1, 1996 [see **American Business**, EATD, LATD]

American Business — (1) RRC 4, Sch. 2, §1: shall have the meaning given in the EATD (2) RRC 5, Sch. 3, §17: shall have the meaning given in the EATD (3) EATD, §1: such part of a Name’s underwriting business at Lloyd’s (other than long term business as defined from time to time by the Insurance Companies Act (U.K.) 1982 or by a later similar statute) as complies with the following two conditions: (i) the liability of the Name in respect thereof is expressed in U.S. dollars; and (ii) the premium payable to or for the account of the Name has been paid or is payable in U.S. dollars; excluding all such business as comprises any contract or policy of insurance or reinsurance underwritten or incepting on or after August 1, 1995 except for: (a) contracts or policies underwritten under a binding authority incepting prior to that date; (b) contracts or policies of insurance written pursuant to Lloyd’s license in Kentucky prior to January 1, 1996; and (c) any contract of Reinsurance to Close for any Year of Account prior to the 1995 Year of Account underwritten by a Name (to the extent only that the premium payable to or for the account of the Name has been paid or is payable in U.S. dollars or the liability of the Name in respect of such contract is expressed in U.S. dollars) [see **American business**, EATD, LATD]

American Policy — Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.1: (i) any contract or policy of insurance issued or any agreement to insure made by one or more Underwriters pursuant to surplus lines or excess lines laws of any state, district, territory, commonwealth or possession of the United States in which Underwriters are not licensed to do an insurance business; provided that, with the exception of such Policies attaching on or prior to November 15, 1995 underwritten under any binding authority incepting prior to August 1, 1995, and subject to (ii) below, such Policies shall not include any contract or policy of insurance (or any agreement to insure) incepting on or after August 1, 1995, which is (or is to be) underwritten by Underwriters on or after August 1, 1995; or (ii) any contract or policy of insurance or any agreement to insure which satisfies the definition of an American Policy as set forth in Lloyd’s United States Situs Surplus Lines Trust Deed as prescribed from time to time by Council [see **Policyholder**]

American Reinsurance Policy — Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §1.1: (i) any contract or policy of reinsurance issued or any agreement to reinsure made by one or more Underwriters which is issued to a Ceding Insurer, as defined herein, providing reinsurance with respect to property or risks situated in a state, district, territory, commonwealth or possession of the United States, provided that, with the exception of such Policies attaching on or prior to November 15, 1995 under-

written under any binding authority incepting prior to August 1, 1995, and subject to (ii) below, such Policies shall not include any contract or policy of reinsurance (or any agreement to reinsure) incepting on or after August 1, 1995, which is (or is to be) underwritten by Underwriters on or after August 1, 1995; or (ii) any contract or policy of reinsurance or any agreement to reinsure which satisfies the definition of an American Reinsurance Policy as set forth in Lloyd's United States Situs Credit For Reinsurance Trust Deed as prescribed from time to time by Council

Annual Adjustment — RRC 4, Sch. 5, §2: in respect of any year, the amount representing such percentage of the Available Surplus for that year as the Board of ERL resolves, in accordance with paragraph 3.2, should be returned to Names

APH Claims — RRC 4, Sch. 2, §1: any Claim occasioned by asbestos, onshore pollution or any health hazard

Articles — RRC 17, §1.1: the Articles of Association for the time being of EHL (the form of the Articles at the date hereof is set out in the First Schedule hereto)

Asset, Assets — EATD, §2(a): the assets described in Exhibit A hereto, and ... such other assets as the Grantor may from time to time be required or desire to deposit

Assigned Property — RRC 4, Sch. 2, §1: has the meaning ascribed to it in clause 4.1

associate — RRC 1, Sch. 1, §1: any person for whose acts or omissions another person is vicariously responsible

Assumed Liability — RRC 4, Sch. 2, §1: in relation to a Segregated Account any creditor or liability at the Effective Date properly included or which ought properly to have been included in the Segregated Account and all personal expenses arising between 31 December 1995 and the Effective Date and unpaid at the Effective Date in respect of Syndicate 1992 and Prior Business in each case, as shown in the relevant Completion Accounts

Audit — LATD, §1: the audit to be conducted by Syndicate auditors after September 1, 1996 for the purpose verifying the amount of assets held by Syndicates in respect of 1992 and Prior Business which should have been transferred to the Grantor and/or as the Grantor directed pursuant to the Reinsurance Agreement

Auditor Persons — RRC 1, Sch. 1, §1: those persons or firms referred to in parts II and III of Schedule 1 to the Auditors' Contribution Agreement, including the past and present partners, directors, officers, associates and employees of each of the Auditors and their predecessor firms, but only in that capacity

Auditor — RRC 1, Sch. 1, §1: the present partners of those audit firms which execute the Auditors' Contribution Agreement, but only in that capacity

Auditor Settlement Fund — (1) RRC 1, Sch. 1, §1: the fund of approximately £156 million offered to Names in accordance with the terms of the Settlement Offer Document (2) RRC 4, Sch. 2, §1: the fund of approximately £152 million offered to Names in accordance with the terms of the Settlement Offer Document [see **Combined Litigation Settlement Funds**; **Litigation Settlement Fund**; **Settlement Fund**]

Auditors' Contribution Agreement — RRC 1, Sch. 1, §1: the agreement entered into, or to be entered into, between the Auditors and Lloyd's in connection with the Settlement Offer

Australian Business — (1) RRC 4, Sch. 2, §1: the aggregate of the assets in the EAusCA (2) RRC 5, Sch. 3, §17: shall have the equivalent meaning to that proposed to be given to the then "Australian Liabilities" in the EAusCA

Australian Custody Assets — (1) RRC 4, Sch. 2, §1: the aggregate of the assets in the EAusCA (2) RRC 5, Sch. 3, §17: the aggregate of the assets administered pursuant to the EAusCA

Australian Rate — (1) RRC 4, Sch. 2, §1: the rate at which the Australian Business may be discharged from the Australian Custody Assets alone (2) RRC 5, Sch. 3, §17: the rate at which the Australian Liabilities may be discharged from the Australian Trust Assets alone

Authorised Investments — RRC 7, §1.1: any investment authorised by English law for the investment by trustees of trust moneys or in any other investment which may be selected by the Trustee as if the Trustee were an absolute beneficial owner of the Trust Property

Automatic Reinsurance Trigger Event — RRC 4, Sch. 2, §1: has the meaning set out in paragraph 2.3 of schedule 3 [see **Automatic Trigger Event**; **Certified Reinsurance Trigger Event**; **Certified Trigger**

Event; Trigger Event. The term “Automatic Retrocession Trigger Event” (RRC 5, §2.4) appears to be a drafting error.]

Automatic Trigger Event — RRC 5, Sch. 3, §17: has the meaning set out in paragraph 2.3 of this schedule [see **Automatic Reinsurance Trigger Event; Certified Reinsurance Trigger Event; Certified Trigger Event; Trigger Event**]

Available Assets — (1) RRC 4, Sch. 2, §1: the assets of ERL (including ERL’s rights under the Retrocession Agreement) as at the Record Date less the amount of the General Creditors as at the Record Date (2) RRC 5, Sch. 3, §17: the assets of Equitas as at the Record Date less the amount of the General Creditors as at the Record Date [see **Dedicated Assets; Non Dedicated Available Assets; Relevant Available Assets; Available Surplus**]

Available Surplus — (1) RRC 4, Sch. 5, §2: in respect of any year, the aggregate of the amount received by ERL from Equitas pursuant to clause 4 of the Retrocession Agreement and any Retained Amount from the previous year (2) RRC 5, Sch. 2, §1: the amount by which the aggregate value of the assets, including non-insurance accruals and other debtors, held by Equitas in respect of the 1992 and Prior Business valued on any date exceeds on such date the aggregate value of the sum of (i) the outstanding liabilities in relation to the 1992 and Prior Business as so valued, (ii) any margin of solvency Equitas is required by the DTI to maintain in respect of the 1992 and Prior Business, (iii) the net present value of the anticipated expenses of the Run-off for the period up to the date on which it is anticipated that Equitas will have no further liability in respect of the 1992 and Prior Business; (iv) any additional reserves or other amounts Equitas is obliged to maintain, whether for regulatory reasons or otherwise, from time to time, and (v) any transfer to reserves which the Board of Equitas resolves is necessary to be made to maintain reserves for the discharge of the reasonable expectations and rights of the holders of any External Capital [see **Available Assets; Dedicated Assets; Non Dedicated Available Assets; Relevant Available Assets**]

B

Beneficiary — (1) EATD, parties: Citibank, N.A., a national banking association organized under the laws of the United States, in its capacity the American Trustee of each of the separate Lloyd’s American Trust Funds created under the Lloyd’s American Trust Deed (2) EATD, §1: the trustee from time to time under the Lloyd’s American Trust Deed, and any successor or replacement trustee, including any successor by operation of law, including, without limitation, any liquidator, rehabilitator, receiver or conservator (3) Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.2: any Policyholder (as defined herein) and any Third Party Claimant (as defined herein)

Board of Equitas — RRC 5, Sch. 3, §17: the board of directors of Equitas

Board of ERL — RRC 4, Sch. 2, §1: the board of directors of ERL

Books and Records — RRC 4, Sch. 2, §1: in respect of each Syndicate and Closed Year Syndicate, all such information concerning the Syndicate 1992 and Prior Business of that Syndicate or Closed Year Syndicate and assets held in respect thereof including (without prejudice to the generality of the foregoing) policy slips, policy wordings, underwriting cards, certificates of insurance, policy renewal or cancellation documents, claims information (including print-outs of recorded claims provided by that Syndicate or Closed Year Syndicate or by Lloyd’s Claims Office), reserving documentation, reinsurance information, facultative and treaty outwards reinsurance wordings, and all correspondence relating thereto and all books of account, financial information, investment records, accounting records and other records (however stored) prepared or maintained by or on behalf of that Syndicate or Closed Year Syndicate

Broker — (1) RRC 1, Sch. 1, §1: the companies and partnerships who execute deeds of adherence to the Brokers’ Agreement, but only in that capacity (2) RRC 4, Sch. 2, §1: any body corporate or partnership which as at the date hereof is permitted to broke insurance business at Lloyd’s by virtue of its registration under the Lloyd’s Brokers Byelaw or by virtue of being a party to an umbrella arrangement registered under the Umbrella Arrangements Byelaw (No. 6 of 1988) and any partners, directors, officers and/or employees of such body corporate or partnership

Broker Persons — RRC 1, Sch. 1, §1: any subsidiary or holding company (whether direct or indirect) of a Broker, or any other subsidiary of any such holding company, from time to time, including any former holding company or subsidiary, and the past and present partners, directors, officers, associates and employees of a Broker or of any such companies or partnerships, but only in that capacity

Broker's Claim — RRC 4, Sch. 2, §1: has the meaning set out in clause 6.16

Broker's Group — RRC 4, Sch. 2, §1: a Broker and any subsidiary or holding company (whether direct or indirect), or any other subsidiary of any such holding company, of a Broker from time to time, including any former holding company or subsidiary, and all past or present partners, directors, officers and/or employees from time to time of any of such companies or partnerships, but shall not include any current or former member of such group which is an insurance company which has issued policies or contracts of reinsurance or retrocession in favour of a Syndicate or Closed Year Syndicate

Brokers' Agreement — RRC 1, Sch. 1, §1: the agreement entered into, or to be entered into, between certain brokers, Lloyd's and Equitas in connection with the Reconstruction and Renewal Proposals

Brokers' Contribution Arrangements — RRC 1, Sch. 1, §1: the fee to be paid by brokers pursuant to the brokers contribution requirements made under the Reconstruction and Renewal (Amendment) Byelaw (No. 26 of 1996)

business day — RRC 4, Sch. 2, §1: any day other than a Saturday or Sunday on which banks are open for business in London

C

Can\$ or Canadian Dollar — RRC 4, Sch. 2, §1: the lawful currency of Canada

Canadian Business — (1) RRC 4, Sch. 2, §1: shall have the meaning give in the ECTD (2) RRC 5, Sch. 3, §17: shall have the meaning given in the ECTD [see LCTD; LCTF; Lloyd's Canadian Trust Deed]

cash — EATD, §1: United States legal tender

Ceding Insurers — Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.2: for the purposes of this Trust Deed, ... an insurer domiciled in a state, district, territory, commonwealth or possession of the United States which has ceded insurance risk underwritten by such insurer to one or more Underwriters pursuant to an American Reinsurance Policy

Central Fund — (1) RRC 1, Sch. 1, §1: has the meaning given in the Central Fund Byelaw (No. 4 of 1986) (2) RRC 4, Sch. 2, §1: the fund constituted by the Central Fund Byelaw (No. 4 of 1986)

Centrewrite Reinsurance — (1) **Equitas Holdings Articles**: the Centrewrite Reinsurance Contract dated 7 February 1997 between Equitas Reinsurance Limited, Centrewrite Limited and certain underwriting members of Lloyd's for the reinsurance of Centrewrite Limited in respect of its liabilities to syndicate 553 for the 1985 and 1987 years of account (2) RRC 4, Sch. 2, §1: the agreement between ERL and Centrewrite Limited for the reinsurance of Centrewrite Limited in respect of its liabilities to syndicate 553 for the 1985 and 1987 years of account (3) RRC 5, recital (A): ERL has entered into reinsurance contracts under which it has agreed to reinsure and indemnify ... Centrewrite in respect of its liabilities to the Warrilow Syndicates in respect of 1992 and Prior Business

Certified Reinsurance Trigger Event — RRC 4, Sch. 2, §1: has the meaning set out in paragraph 2.1 of schedule 3 [see Automatic Reinsurance Trigger Event, Automatic Trigger Event, Certified Trigger Event, Trigger Event]

Certified Trigger Event — RRC 5, Sch. 3, §17: has the meaning set out in paragraph 2.1 of this schedule [see Automatic Reinsurance Trigger Event; Automatic Trigger Event; Certified Reinsurance Trigger Event; Trigger Event. The term "Certified Retrocession Trigger Event" (RRC 5, §2.4) appears to be a drafting error.]

Claim — (1) RRC 1, Sch. 1, §1: a claim, potential claim, counterclaim, claim by way of enforcement of judgment, award or order of any kind (including as to interest and costs), right of appeal, claim by way of contribution, right of set off, indemnity, cause of action, right or interest of any kind or nature whatsoever, whether known or unknown, suspected or unsuspected, whether arising in contract tort, equity, fraud, as a consequence of wilful, reckless or negligent conduct, or of any fiduciary, statutory, regulatory or other duty, or otherwise, howsoever and whenever arising, and in whatever capacity and juris-

diction (2) **RRC 4, Sch. 2, §1**: any claim, potential claim, counterclaim, claim by way of enforcement of judgment, award or order of any kind (including as to interest and cost), right of appeal, claim by way of contribution, right to set off, indemnity, cause of action, right or interest, of any kind, whether known or unknown, suspected or unsuspected, arising out of, or in any way related to or connected with any contract of insurance, liabilities under which are comprised within the definition 1992 and Prior Business (3) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.3**: (i) a claim against one or more Underwriters by a Policyholder, as defined herein, or Third Party Claimant for a loss under an American Policy excluding punitive or exemplary damages awarded to or against a Policyholder and also excluding any extra contractual obligations not expressly covered by the American Policy ("Loss"); or (ii) a claim against one or more Underwriters by a Policyholder for the return of unearned premium under an American Policy ("Unearned Premium") (4) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.3**: (i) a claim against one or more Underwriters by a Ceding Insurer, as defined above, for a loss under an American Reinsurance Policy excluding punitive or exemplary damages awarded against a Ceding Insurer and also excluding any extra contractual obligations not expressly covered by the American Reinsurance Policy; and/or (ii) a claim against one or more Underwriters by a Ceding Insurer for the return of unearned premium under an American Reinsurance Policy; both (i) and (ii) shall constitute a loss under an American Reinsurance Policy ("Loss")

Closed Year Name — Equitas Holdings Articles: a present or former underwriting member of Lloyd's who was a member of any syndicate reinsured to close, whether directly or indirectly, into any syndicate specified in schedule 1 to the Reinsurance Contract or into syndicate 553 for the 1985 and 1987 years of account, in each case in their capacity as members of one or more of such syndicates, and any person to whom the benefit of the Reinsurance Contract or the benefit of the Centrewrite Reinsurance shall pass or shall have passed on the death of any such Closed Year Name [*see Closed Year Names; Name; Names; Reinsured Names*]

Closed Year Names — (1) RRC 4, parties: the underwriting members of Lloyd's comprising syndicates reinsured to close whether directly or indirectly into the Syndicates or Centrewrite (the Closed Year Syndicates and each a Closed Year Syndicate) in their capacity as members of one or more of the Closed Year Syndicates (2) **RRC 4, Sch. 2, §1**: in respect of any Closed Year Syndicate, those members of Lloyd's who were members of that Closed Year Syndicate acting in their capacity as members of the Closed Year Syndicate (3) **RRC 7, §1.1**: in respect of any Closed Year Syndicate, those members of Lloyd's who were members of that Closed Year Syndicate acting in their capacity as members of the Closed Year Syndicate [*see Closed Year Name; Name; Names; Reinsured Names*]

Closed Year Syndicate — (1) RRC 4, Sch. 2, §1: any syndicate constituted for the 1992 or any prior year of account which has been reinsured to close either directly or indirectly into any Syndicate or Centrewrite (2) **RRC 7, §1.1**: any Syndicate constituted for any 1992 or prior year of account which has been reinsured to close either directly or indirectly into any Syndicate or Centrewrite

Combined Litigation Settlement Funds — (1) RRC 1, Sch. 1, §1: the sum of the Litigation Settlement Fund and the Auditor Settlement Fund (2) **RRC 4, Sch. 2, §1**: the sum of the Litigation Settlement Fund and the Auditor Settlement Fund

Completion Accounts and Co-operation Agreement — RRC 4, Sch. 2, §1: the completion accounts and co-operation agreement entered into or to be entered into between ERL, Equitas and each Managing Agent pursuant to a direction of the Council

Confidential Information — RRC 4, Sch. 2, §1: all information of whatever nature in whatever form (including, for the avoidance of doubt, professional advice) relating to the business affairs of any Syndicate or Closed Year Syndicate other than information which (a) at the time when it is disclosed or obtained is in the public domain; or (b) subsequently comes into the public domain otherwise than as a result of the breach by any party (or its employees, agents, subcontractors or representatives) of the terms of this Agreement

Contingent Insurance Creditor — RRC 4, Sch. 2, §1: any Insurance Creditor in respect of whom a liability has been incurred but not reported [*see Actual Insurance Creditor; General Creditor; Insurance Creditor*]

contract of insurance — RRC 4, Sch. 2, §1: any contract of insurance (whether direct or otherwise) or reinsurance [*see* **reinsurance**]

Contribution Period — (1) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.4**: each period of time determined by the Council during which each group of Current Contributors is required to maintain the Current Contributions in the Trust Fund (2) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1. 14**: each period of time determined by the Council during which each group of Current Contributors is required to maintain the Current Contributions in the Trust Fund

control including the related terms “controlled by” and “under common control with” — EATD, §1: with respect to any person, the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such person, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise; but no person shall be deemed to control another person solely by reason of his being an officer or director of such other person. Control shall be presumed to exist if any person directly or indirectly owns, controls or holds with the power to vote fifty (50%) percent or more of the voting securities of any other person

Council — (1) **RRC 1, Sch. 1, §1**: the Council of Lloyd's, including its members and any persons by whom it acts (2) **RRC 4, Sch. 2, §1**: the Council of Lloyd's and includes its delegates and any persons by whom it acts (3) **EATD, §1**: the Council of Lloyd's constituted by Lloyd's Act 1982, and shall include its delegates and persons by whom it acts (4) **LATD, §1.4**: the Council of Lloyd's constituted by Lloyd's Act 1982 and (except only for the purpose of Paragraph 12.1 hereof) such persons as shall from time to time be authorized by the Council to exercise any power hereby conferred on the Council (5) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.5**: the Council of Lloyd's or (in relation to any power or discretion which is hereby vested in the Council but which has for the time being been delegated by the Council to the Committee of Lloyd's or to the Chairman or a Deputy Chairman of the Committee of Lloyd's pursuant to the provisions of section 6(6) of Lloyd's Act 1982) the Committee of Lloyd's or the Chairman or a Deputy Chairman of Lloyd's as the case may be or such other person or persons (including Lloyd's Signatory) as are for the time being authorized by the Council of Lloyd's to exercise any power or discretion which is hereby vested in the Council (6) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1. 16**: the Council of Lloyd's or (in relation to any power or discretion which is hereby vested in the Council but which has for the time being been delegated by the Council to the Committee of Lloyd's or to the Chairman or a Deputy Chairman of the Committee of Lloyd's pursuant to the provisions of section 6(6) of Lloyd's Act 1982) the Committee of Lloyd's or the Chairman or a Deputy Chairman of Lloyd's as the case may be or such other person or persons (including Lloyd's Signatory) as are for the time being authorized by the Council of Lloyd's to exercise any power or discretion which is hereby vested in the Council

CSU — RRC 4, Sch. 2, §1: Lloyd's Central Services Unit

Current Contributors — (1) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.6**: those persons (whether individuals, bodies corporate or partnerships and whether or not Underwriters) whose contributions to the Trust Fund constitute the principal of the Trust Fund for the time being, the total amount contributed for the time being to be the “Current Contributions,” and each contribution to the Trust Fund to be a “Current Contribution” (2) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1. 13**: those persons (whether individuals, bodies corporate or partnerships and whether or not Underwriters) whose contributions to the Trust Fund constitute the principal of the Trust Fund for the time being, the total amount contributed for the time being to be the “Current Contributions,” and each contribution to the Trust Fund to be a “Current Contribution”

D

Debt Credits — (1) **RRC 1, Sch. 1, §1**: in respect of each Name, any amount offered to that Name as so described and set out in his Finality Statement including any State Credits, to be applied in the reduction of the amount to be paid by that Name pursuant to his Name's Finality Statement (which may include the waiver of certain amounts owing to Lloyd's arising out of the application of assets of the Central Fund on his behalf) (2) **RRC 4, Sch. 2, §1**: in respect of each Name, any amount offered to that

Name as set out in his Finality Statement (including any State Credits) or otherwise offered in accordance with the terms of the Settlement Offer and which shall be applied towards the payment of his Name's Premium (which may include the waiver of certain amounts owing to Lloyd's arising out of the application of assets of the Central Fund on his behalf)

Declaration of Trust — RRC 4, Sch. 2, §1: the declaration of trust in relation to the Assigned Property in the form set out in Appendix 1 to this Agreement to be declared by the Trustee on the date hereof

Dedicated Assets — (1) RRC 4, Sch. 2, §1: the aggregate of the US Trust Assets, the ECTF Assets and the Australian Custody Assets, or any of them, as the context may require (2) RRC 5, Sch. 3, §17: the aggregate of the US Trust Assets, the ECTF Assets and the Australian Assets, or any of them, as the context may require

Deferred Share — **Equitas Holdings Articles**: an issued deferred redeemable share of £1 in the capital of the Company

Deficit — RRC 5, Sch. 2, §1: the amount by which the aggregate value of the assets, including non-insurance accruals and other creditors, held by Equitas in respect of the 1992 and Prior Business valued on any date is less than the aggregate value on such date of the sum of (i) the outstanding liabilities in relation to the 1992 and Prior Business as so valued, (ii) any margin of solvency Equitas is required by the DTI to maintain in respect of the 1992 and Prior Business, (iii) the net present value of the anticipated expenses of the Run-off for the period up to the date on which it is anticipated that Equitas will have no further liability in respect of the 1992 and Prior Business, (iv) any additional reserves or other amounts Equitas is obliged to maintain, whether for regulatory reasons or otherwise, from time to time, and (v) any transfer to reserves which the Board of Equitas resolves is necessary to be made to maintain reserves for the discharge of the reasonable expectations and rights of the holders of any External Capital

Designee — EATD, §3(a): a third party ... to whom Assets specified therein [Withdrawal Notice] shall be delivered

Discretionary Class — RRC 17, §1.1: the charities and other bodies specified in the Second Schedule hereto

Distributable Surplus — RRC 5, Sch. 2, §1: in respect of any 31 December, the lower of (i) the Available Surplus as at that date and (ii) the average of the Available Surplus as at that date and the Available Surplus (if any) as at 31 December in the two immediately preceding years

Domiciliary Commission — (1) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.7**: the Chief Regulatory Officer for Insurance of the United States jurisdiction in which the Trust Fund is principally maintained and administered, identified on page one of this Trust Deed (2) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.8**: the Chief Regulatory Officer for Insurance of the United States jurisdiction in which the Trust Fund is principally maintained and administered, identified on page one of this Trust Deed

DTI — RRC 4, Sch. 2, §1: the Department of Trade and Industry or such other governmental or other authority as from time to time carries out the functions in relation to insurance business carried on in the United Kingdom as are at the date of this Agreement carried out by that Department

E

E&O Companies — RRC 5, Sch. 1, §1: shall have the meaning ascribed thereto in the E&O Companies Reinsurance

E&O Companies Reinsurance — (1) RRC 4, Sch. 2, §1: the contract of insurance between ERL and various company underwriters in respect of all errors & omissions insurance liabilities in respect of 1992 and Prior Business under various policies as set out therein (2) **RRC 5, recital (A)**: ERL has entered into reinsurance contracts under which it has agreed to reinsure and indemnify ... the E&O Companies in respect of all liabilities in respect of 1992 and Prior Business under the E&O Policies

E&O Insurers — RRC 1, Sch. 1, §1: the Syndicates and companies which execute deeds of adherence to the E&O Insurers Contribution Agreements or on whose behalf such deeds of adherence are executed, but only in their capacity as insurers of relevant E&O policies

- E&O Policy** — RRC 5, Sch. 1, §1: shall have the meaning ascribed thereto in the E&O Companies Reinsurance
- EATD** — (1) RRC 4, Sch. 2, §1: the deed of trust to be entered into by Equitas and ERL with Citibank, N.A. as trustee, in favour of the trustee of the LATD, as may be amended from time to time (2) RRC 5, Sch. 3, §17: the deed of trust to be entered into by Equitas and ERL with Citibank, N.A. as trustee, in favour of the trustee of the LATD, as may be amended from time to time
- EATF** — (1) RRC 4, Sch. 2, §1: the trust fund from time to time held under the terms of the EATD (2) RRC 5, Sch. 3, §17: the trust fund from time to time held under the terms of the EATD
- EAusCA** — (1) RRC 4, Sch. 2, §1: the custodian agreement proposed to be entered into by Equitas with the responsible authorities in Australia in connection with the revised trading arrangements proposed to be established there (2) RRC 5, Sch. 3, §17: the custodian agreement proposed to be entered into by Equitas with the responsible authorities in Australia in connection with the revised trading arrangements proposed to be established there
- EAusTF** — RRC 5, Sch. 3, §17: the trust fund proposed to be established pursuant to the EAusTA
- ECTD** — (1) RRC 4, Sch. 2, §1: the deed of trust to be entered into by Equitas and ERL with the Royal Trust Corporation of Canada as trustee, in favour of the trustee of the LCTD, as may be amended from time to time (2) RRC 5, Sch. 3, §17: the deed of trust to be entered into by Equitas and ERL with the Royal Trust Corporation of Canada as trustee, in favour of the trustee of the LCTD, as may be amended from time to time
- ECTF** — (1) RRC 4, Sch. 2, §1: the trust fund from time to time held under the terms of the ECTD (together with, for the purposes of schedule 3 only, such amounts, if any, as are held in the LCTF and are available only for the discharge of 1992 and Prior Business) (2) RRC 5, Sch. 3, §17: the trust fund from time to time held under the terms of the ECTD (together with such amounts, if any, as are held in the LCTF and are available only for the discharge of 1992 and Prior Business)
- ECTF Assets** — (1) RRC 4, Sch. 2, §1: the aggregate of the assets in the ECTF (2) RRC 5, Sch. 3, §17: the aggregate of the assets in the ECTF
- ECTF Rate** — (1) RRC 4, Sch. 2, §1: the rate at which liabilities applicable to Canadian Business may be discharged from ECTF Assets alone (2) RRC 5, Sch. 3, §17: the rate at which liabilities applicable to Canadian Business may be discharged from ECTF Assets alone
- Effective Date** — (1) RRC 4, Sch. 2, §1: 09.00 BST on the business day immediately following the date on which the last of the conditions set out in clause 2.1 is satisfied (2) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.8**: with respect to this Instrument the date of execution hereof (3) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.11**: with respect to this Instrument the date of execution hereof
- EHL** — RRC 17, parties: Equitas Holdings Limited a limited company registered in England and Wales with company number 3136296 whose registered office is at 20-22 Bedford Row, London WC1R 4JS [see **Equitas Holdings**; in this work "Equitas Holdings"]
- EL** — (1) RRC 17, parties: Equitas Limited a limited company registered in England and Wales with company number 3173352 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (2) **EATD, parties**: Equitas Limited ..., a company incorporated in England (3) **LATD, §1.2(B)**: Equitas Limited [see **Equitas**; **Equitas Holdings**; in this work "Equitas Ltd."]
- Eligible Securities** — **EATD, §1**: shall mean and include certificates of deposit issued by a United States bank and payable in United States legal tender, including those issued by the corporation acting as Trustee, or any successor Trustee, or the corporation acting as Beneficiary, and securities, including those issued by the corporation acting as Trustee, or any successor Trustee, or the corporation acting as Beneficiary, representing investments of the types specified in paragraphs (1), (2), (3), (8) or (10) of subsection (a) of Section 1404 of the New York Insurance Law; provided, however, that no such securities shall have been issued by a Parent, a Subsidiary or an Affiliate of the Grantor
- Equitas** — (1) RRC 1, Sch. 1, §1: Equitas Reinsurance Limited, a limited company registered in England and Wales with company number 3136300 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (2) RRC 4, parties: Equitas Limited a limited company registered in England and Wales

with company number 3173352 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (3) **RRC 5, parties:** Equitas Limited a limited company registered in England and Wales with company number 3173352 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (4) **RRC 7, §1.1:** Equitas Limited, a limited company registered in England and Wales with company number 3173352 whose registered office is at 20-22 Bedford Row, London WC1R 4JS [*see* **EL**; **Equitas Group**; **ERL**; *in this work* “Equitas Re”]

Equitas Claim — **RRC 1, Sch. 1, §1:** a Claim howsoever arising out of, or in any way related to or connected with, whether directly or indirectly, 1992 and Prior Business, the benefit of which is assigned or transferred to Equitas, or in respect of which Equitas is otherwise entitled pursuant to the Reinsurance Contract, including, without limitation, Claims in respect of Syndicate reinsurances, premiums, premium returns, salvages or other assets receivable from any other person (or, in each case, any security therefor or other right relating thereto)

Equitas Documents — **RRC 1, Sch. 1, §1:** any agreement entered into or to be entered into between, inter alia, Equitas and any agents in relation to 1992 and Prior Business, including the supervisory management agreements, the information and administration agreements and the run-off administration agreements

Equitas Group — (1) **RRC 1, Sch. 1, §1:** Equitas and any subsidiary or holding company of Equitas and any subsidiary of any such holding company (2) **RRC 4, Sch. 2, §1:** ERL and any subsidiary or holding company (whether direct or indirect) or any other subsidiary of any such holding company [*see* **EHL**; **EL**; **Equitas**; **Equitas Holdings Limited**; **Equitas Trustee**; **ERL**]

Equitas Holdings Limited — **RRC 7, §1.1:** Equitas Holdings Limited, a limited company registered in England and Wales with company number 3136296 whose registered office is at 20-22 Bedford Row, London WC1R 4JS [*see* **EHL**; **Equitas Group**; *in this work* “Equitas Holdings”]

Equitas Reinsurance Agreement — **LATD, §1.5:** the Reinsurance and Run-off Contract to be entered into pursuant to which ERL will reinsure 1992 and Prior Business, as the same may from time to time be amended or supplemented [*see* **Equitas Reinsurance Contract**; *in this work* “RRC 4”]

Equitas Reinsurance Contract — **RRC 5, recital (A):** ERL has entered into reinsurance contracts under which it has agreed to reinsure and indemnify the Names and the Closed Year Names in respect of 1992 and Prior Business [*see* **Equitas Reinsurance Agreement**; *in this work* “RRC 4”]

Equitas Retrocession Agreement — **LATD, §1.6:** the Retrocession Agreement to be entered into between ERL and EL, pursuant to which EL will agree to reinsure and indemnify ERL against, inter alia, its Reinsurance Obligation as the same may from time to time be amended or supplemented [*in this work* “RRC 5”]

Equitas Scheme — (1) **RRC 1, Sch. 1, §1:** the scheme for the reinsurance to close by Equitas of 1992 and Prior Business as referred to in the Reconstruction and Renewal Byelaw (2) **RRC 4, Sch. 2, §1:** the scheme for the reinsurance by ERL of all 1992 and Prior Business as described in the Reconstruction and Renewal Byelaw [*see* **Reconstruction and Renewal Proposals**]

Equitas Termination Notice — **LATD, §1.7:** a notice of termination of the Equitas Trust Agreement given in accordance with the Equitas Trust Agreement to the American Trustee, as beneficiary under the Equitas Trust Agreement

Equitas Trust Agreement — **LATD, §1.8:** the Trust Agreement to be entered into among ERL and EL, as grantors, the American Trustee, as beneficiary, and the Equitas Trustee, as the same may from time to time be amended or supplemented [*in this work* “EATD”]

Equitas Trust Fund — **LATD, §1.9:** the trust fund under the Equitas Trust Agreement and any successor or replacement trust fund [*in this work* “EATF”]

Equitas Trustee — **LATD, §1.10:** Citibank, N.A., in its capacity as trustee under the Equitas Trust Agreement, and any successor or replacement trustee therefor or any other successor thereto

ERL — (1) **RRC 4, parties:** Equitas Reinsurance Limited a limited company registered in England and Wales with company number 3136300 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (2) **RRC 5, parties:** Equitas Reinsurance Limited a limited company registered in England and Wales with company number 3136300 whose registered office is at 20-22 Bedford Row, London

WC1R 4JS (3) **RRC 7, §1.1:** Equitas Reinsurance Limited, a limited company registered in England and Wales with company number 3136300 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (4) **EATD, parties:** Equitas Reinsurance Limited ..., a company incorporated in England (5) **LATD, §1.2(B):** Equitas Reinsurance Limited [*see Equitas; Equitas Holdings; in this work “Equitas Re”*]

Estate Protection Plan — **RRC 4, Sch. 2, §1:** has the meaning ascribed to estate reinsurance contract in the Personal Stop Loss Regulation (No. 2 of 1990)

External Capital — **RRC 5, Sch. 1, §1:** any debtor relationship of Equitas entered into, or share capital issued by Equitas, for the purpose of financing its insurance business to the extent that that business is the performance of the Retrocession Obligation and in this definition debtor relationship has the meaning it has for the purposes of corporation tax

F

Finality Statement — (1) **RRC 1, Sch. 1, §1:** the statement of a Name's Lloyd's affairs in respect of his 1992 and Prior Business sent to him with the Settlement Offer Document or otherwise, together with the supporting data to be sent in August 1996 (2) **RRC 4, Sch. 2, §1:** in respect of any Name the statement of that Name's Lloyd's affairs in respect of his 1992 and Prior Business sent to him with the Settlement Offer Document or otherwise, together with the supporting data sent in August 1996

Financial Reinsurance — **RRC 4, Sch. 2, §1:** each contract identified as and which should be treated as financial reinsurance, as set out in the list entitled “List of Financial Reinsurances” in the agreed form, together with such other contracts as may be agreed between ERL and the Substitute Agent from time to time [*see reinsurance*]

Funds at Lloyd's — **RRC 4, Sch. 2, §1:** inter alia, Lloyd's deposits, special reserve funds (whether held under an old special reserve fund trust deed or a new special reserve fund trust deed), guarantees, premium limit excess deposits and personal reserve funds

G

General Creditors — (1) **RRC 4, Sch. 2, §1:** at any time, all persons who are creditors (actual, prospective or contingent) of ERL other than the Reinsured Parties in their capacity as such and, where the context requires, references to General Creditors shall include references to the amount of the claims (actual, prospective or contingent) of General Creditors. For the avoidance of doubt, references to Claims of General Creditors include the estimated costs, at any time, of the future business of ERL carried out pursuant to this Agreement (2) **RRC 5, Sch. 3, §17:** all persons who are creditors (actual, prospective or contingent) of Equitas, ERL or any other member of the Equitas Group (other than ERL under the Retrocession Indemnities) and where the context requires, references to General Creditors shall include references to the amount of the claims (actual, prospective or contingent) of General Creditors. For the avoidance of doubt, references to claims of General Creditors include the estimated costs, at any time, of the future business of Equitas, ERL or any other member of the Equitas Group carried out pursuant to this Agreement or the Equitas Reinsurance Contract [*see Actual Insurance Creditor; Contingent Insurance Creditor; Insurance Creditor*]

Grantor — **EATD, parties:** Equitas Reinsurance Limited ... and Equitas Limited ... both individually and collectively

I

IID — **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.9:** the International Insurers Department of the National Association of Insurance Commissioners (“NAIC”). Decisions under the IID Plan of Operation are made by State Insurance Commissioners acting pursuant to the constitution and bylaws of the NAIC

Illinois Advance — **RRC 4, Sch. 2, §1:** the sums currently held in trust in respect of Names and Closed Year Names in respect of certain classes of business underwritten in Illinois

Illinois Collateral Reinsurance — (1) **RRC 4, Sch. 2, §1**: the contract for the reinsurance of the Illinois Retained Business of Names and Closed Year Names authorised by a certificate of authority to write certain classes of insurance business in the State of Illinois made or to be made between ERL, such Names and Closed Year Names and the Substitute Agent (2) **RRC 5, Sch. 3, §17**: the contract for the reinsurance of the Illinois Retained Business of Names and Closed Year Names authorised by a Certificate of Authority to write certain classes of insurance business in the State of Illinois made between ERL, such Names and Closed Year Names, and the Substitute Agent

Illinois Retained Business — (1) **RRC 4, Sch. 2, §1**: shall have the meaning given in the Illinois Collateral Reinsurance (2) **RRC 5, Sch. 3, §17**: shall have the meaning given in the Illinois Collateral Reinsurance

Illinois Surplus Trust — **RRC 4, Sch. 2, §1**: the surplus trust to be established in respect of the Illinois Collateral Reinsurance by ERL

Illinois Trust Fund — (1) **RRC 4, Sch. 2, §1**: the trust to be established in respect of the Illinois Collateral Reinsurance by ERL in accordance with Section 173.1 of the Illinois Insurance Code and §1104.70 of the Illinois Insurance Department Regulations (2) **RRC 5, Sch. 3, §17**: the trust to be established in respect of the Illinois Collateral Reinsurance by ERL in accordance with Section 173.1 of the Illinois Insurance Code and §1104.70 of the Illinois Insurance Department Regulations

Inception Date — **RRC 4, Sch. 2, §1**: 23.59 GMT on 31 December 1995

Income — **EATD, §6**: all interest, dividends and other income in respect to Eligible Securities in the Trust Fund

Information and Administration Agreement — **RRC 4, Sch. 2, §1**: each agreement entered into between ERL, Lloyd's and the Managing Agent (or any predecessor) of each Syndicate in relation to all Syndicates for which that Managing Agent (or any predecessor) acted as managing agent prior to the Substitute Agent's Appointment, in relation to the provision of information and the administration of the Run-off prior to the date hereof

Initial Reinsurance Contracts — **RRC 5, recital (A)**: ERL has entered into reinsurance contracts under which it has agreed to reinsure and indemnify the Names and the Closed Year Names in respect of 1992 and Prior Business (the Equitas Reinsurance Contract), Centrewrite in respect of its liabilities to the Warrilow Syndicates in respect of 1992 and Prior business (the Centrewrite Reinsurance), the E&O Companies in respect of all liabilities in respect of 1992 and Prior Business under the E&O Policies (the E&O Companies Reinsurance) and the PSL Companies in respect of certain personal stop loss liabilities (the PSL Companies Reinsurance)

Insolvency Event — (1) **RRC 4, Sch. 2, §1**: any of the events specified in paragraph 2.15 of the Declaration of Trust (2) **RRC 7, §1.1**: any of the events specified in clause 2.15 of this Declaration of Trust

Insurance Creditor — (1) **RRC 4, Sch. 2, §1**: any policyholder under any contract of insurance underwritten by a Syndicate or Closed Year Syndicate liabilities under which are comprised in 1992 and Prior Business other than a member or former member of Lloyd's who is such a policyholder in his capacity as an underwriter of insurance business at Lloyd's (2) **RRC 7, §1.1**: any policyholder under any contract of insurance underwritten by a Syndicate or Closed Year Syndicate liabilities under which are comprised in 1992 and Prior Business other than a member or former member of Lloyd's who is such a policyholder in his capacity as an underwriter of insurance business at Lloyd's [*see Actual Insurance Creditor; Contingent Insurance Creditor; General Creditor*]

Interim Proportionate Cover Declaration — **RRC 4, Sch. 2, §1**: a notice or advertisement issued by or under the direction of the Board of ERL stating that a Certified Reinsurance Trigger Event has occurred and the date of such event and whether suspension of payments in respect of Reinsurance Indemnities will come into effect [*see Interim Retrocession Declaration; Proportionate Cover Declaration; Retrocession Declaration*]

Interim Retrocession Declaration — **RRC 5, Sch. 3, §17**: a notice or advertisement issued by or under the direction of the Board stating that a Certified Trigger Event has occurred and the date of such event and whether suspension of payments in respect of Retrocession Indemnities will come into effect [*see Interim Proportionate Cover Declaration; Proportionate Cover Declaration; Retrocession Declaration*]

Investment Manager — **EATD, §1**: the meaning given to it in Section 5(f) hereof

L

LATD or Lloyd's American Trust Deed — RRC 5, Sch. 3, §17: the instrument dated 21 December 1995 constituting the amended and restated Lloyd's American Trust Deed, as amended from time to time [see LATF; Lloyd's American Trust Deed; Lloyd's American Trust Fund]

LATF — (1) RRC 4, Sch. 2, §1: any trust fund from time to time held in respect of a Name under the terms of the Lloyd's American Trust Deed (2) RRC 5, Sch. 3, §17: any trust fund from time to time held in respect of a Name under the terms of the Lloyd's American Trust Deed [see LATD; Lloyd's American Trust Deed; Lloyd's American Trust Fund]

LCTD — RRC 5, Sch. 3, §17: the instrument dated 26 September 1995 constituting the amended and restated Lloyd's Canadian Trust Deed, as amended from time to time [see Lloyd's Canadian Trust Deed]

LCTF — RRC 4, Sch. 2, §1: any trust fund from time to time held in respect of a Name under the terms of the Lloyd's Canadian Trust Deed

Legal Proceedings — RRC 4, Sch. 2, §1: any legal, arbitral, administrative, regulatory or other action or proceeding (including to enforce, or any appeal from, any judgment, award or order) of any nature whatsoever

Letter of Credit — Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.10: a clean, unconditional, irrevocable letter of credit in favor of the Trustee which satisfies the requirements of New York Insurance Law and which is issued or confirmed by a Qualified United States Financial Institution

Letter of Credit Issuer — LATD, §1.12: the meaning ascribed to it in paragraph 4.2(B)

Letter of Credit Obligation — LATD, §1.11: the meaning ascribed to it in paragraph 4.2(B)

life business — (1) RRC 4, Sch. 2, §1: has the meaning ascribed to "long term business" in the Insurance Companies Act 1982 (2) RRC 7, §1.1: has the meaning ascribed to long term business in the Insurance Companies Act 1982

Lioncover — RRC 4, Sch. 2, §1: Lioncover Insurance Company Limited

Lioncover Reinsurance — RRC 4, Sch. 2, §1: any agreement between either ERL or Equitas and Lioncover for the reinsurance of Lioncover in respect of its liabilities in respect of 1992 and Prior Business

Litigation Settlement Fund — (1) RRC 1, Sch. 1, §1: the fund of approximately £980 million offered to Names in accordance with the terms of the Settlement Offer Document (2) RRC 4, Sch. 2, §1: the fund of approximately £980 million offered to Names in accordance with the terms of the Settlement Offer Document [see Auditor Settlement Fund; Combined Litigation Settlement Funds]

Lloyd's — (1) RRC 1, Sch. 1, §1: the Society incorporated by Lloyd's Act 1871 by the name of Lloyd's (2) RRC 4, parties: the society incorporated by Lloyd's Act 1871 by the name of Lloyd's of One Lime Street, London EC3M 7HA (3) RRC 4, Sch. 2, §1: the Society incorporated by Lloyd's Act 1871 by the name of Lloyd's (4) RRC 7, §1.1: the Society incorporated by Lloyd's Act 1871 by the name of Lloyd's (5) RRC 17, parties: the society incorporated by Lloyd's Act 1871 by the name of Lloyd's

Lloyd's American Trust Deed — LATD, §1.13: this Instrument [see LATD; LATF; Lloyd's American Trust Fund]

Lloyd's American Trust Deed or LATD — RRC 4, Sch. 2, §1: the instrument dated 21 December 1995 constituting the amended and restated Lloyd's American Trust Deed, as amended from time to time [see LATD; LATF; Lloyd's American Trust Fund]

Lloyd's American Trust Fund — (1) EATD, §1: the meaning set forth in the Lloyd's American Trust Deed (2) LATD, §1.14: the property held in trust hereunder [see LATD; LATF; Lloyd's American Trust Deed]

Lloyd's Canadian Trust Deed or LCTD — RRC 4, Sch. 2, §1: the instrument dated 26 September 1995 constituting the amended and restated Lloyd's Canadian Trust Deed, as amended from time to time [see LCTF]

Lloyd's Director — Equitas Holdings Articles: the person appointed as a director in accordance with the provisions of Article 61

Lloyd's Signatory — (1) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.11**: in relation to any provision of this Trust Deed, the person or persons for the time being authorized by the Council of Lloyd's for that purpose and designated in writing to the Trustee (pursuant to authority given by the Underwriters) to act on behalf of Underwriters and Current Contributors under this Trust Deed and to give or receive any notice or certification to Underwriters and Current Contributors under this Trust Deed (2) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1. 15**: in relation to any provision of this Trust Deed, the person or persons for the time being authorized by the Council of Lloyd's for that purpose and designated in writing to the Trustee (pursuant to authority given by the Underwriters) to act on behalf of Underwriters and Current Contributors under this Trust Deed and to give or receive any notice or certification to Underwriters and Current Contributors under this Trust Deed

Loss — (1) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.3**: a claim against one or more Underwriters by a Policyholder, as defined herein, or Third Party Claimant for a loss under an American Policy excluding punitive or exemplary damages awarded to or against a Policyholder and also excluding any extra contractual obligations not expressly covered by the American Policy (2) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.3(ii)**: a claim against one or more Underwriters by a Ceding Insurer for the return of unearned premium under an American Reinsurance Policy; both (i) and (ii) shall constitute a loss under an American Reinsurance Policy

M

Managing Agent — **RRC 4, Sch. 2, §1**: in relation to each Syndicate, the managing agent of that Syndicate immediately prior to the Substitute Agent's Appointment [*see Managing Agent's Agreement; Managing Agent's Trustees; Substitute Agent*]

Managing Agent's Agreement — **RRC 4, Sch. 2, §1**: in respect of any Name, the agreement under which the relevant Managing Agent was carrying out the Run-off of any Syndicate of which that Name was a member prior to the Substitute Agent's Appointment whether in the terms of the standard managing agent's agreement (general) (as defined in the Agency Agreement Byelaw (No. 8 of 1988)), the Standard Agency Agreement (as defined in the Agency Agreements Byelaw (No. 1 of 1985)), the Standard Sub-Agent Agreement (as defined in the Agency Agreements Byelaw (No. 1 of 1985)) or any other terms, including, where the Managing Agent was a substitute agent appointed to carry on the duties of a managing agent pursuant to an exercise of the powers of the Council under the Substitute Agent's Byelaw (No. 20 of 1983), the terms of that appointment (including such terms as are referred to therein) [*see Managing Agent; Substitute Agent*]

Managing Agent's Trustees — (1) **RRC 4, parties**: Additional Underwriting Agencies (No. 10) Limited a limited company registered in England and Wales with company number 2666936 whose registered office is at Lloyd's of London, One Lime Street, London EC3M 7HA and Lloyd's, each in their capacity as trustees of the Premiums Trust Funds of the Names and the Closed Year Names (2) **RRC 4, Sch. 2, §1**: Additional Underwriting Agencies (No. 10) Limited and Lloyd's, in their capacity as trustees of the Premiums Trust Funds [*see Managing Agent*]

Matured Claim — (1) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.12**: a Claim which is enforceable against the Trust Fund as provided for in Paragraph 2.3 of this Trust Deed (2) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.5**: a Claim which is enforceable against the Trust Fund as provided for in Paragraph 2.3 of this Trust Deed

Members' Agent — (1) **RRC 4, Sch. 2, §1**: a person who is listed as a members' agent in the register of underwriting agents maintained under the Underwriting Agents Byelaw (No. 4 of 1984) or any substitute agent appointed to carry on any of the functions of a members' agent and who acts as a members' agent on behalf of one or more of the Names (2) **LATD, §1.15**: an underwriting agent which is listed as a members' agent on the Lloyd's register of underwriting agents, any successor thereto, or any substitute agent appointed by the Council as a members' agent in respect of the Name (3) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.13**: an underwriting agent which is listed as a members' agent on the Lloyd's register of underwriting agents (4) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1. 17**: an underwriting agent which is listed as a members' agent on the Lloyd's register of underwriting agents [*see Substitute Agent*]

N

Name — (1) **Equitas Holdings Articles**: a member of a Syndicate, except that when used in Article 102(g), “Name” or “Names” means a present or former underwriting member of Lloyd’s who was a member of any Syndicate specified in schedule 1 to the Reinsurance Contract as constituted for the years of account specified in that schedule in their capacity as members of one or more of such syndicates and any person to whom the benefit of the Reinsurance Contract shall pass or shall have passed on the death of any such Name (2) **RRC 1, Sch. 1, §1**: a member of a Syndicate and, where the context so requires, includes any administrator, committee, curator bonis, executor, liquidator, manager, personal representative, receiver (including any receiver appointed under the Mental Health Act 1983), supervisor, trustee in bankruptcy and any other person entitled or bound to administer the affairs of a member of a Syndicate for him and any person performing similar functions in any jurisdiction for him (3) **EATD, §1**: an underwriting member of Lloyd’s, or former underwriting member of Lloyd’s, for an underwriting Year of Account, who is, or was, acting in such capacity, and who is a party to the Lloyd’s American Trust Deed in respect of his or her American Business, including the individual member’s executors and any administrator, administrative receiver, committee, curator, liquidator, manager, personal representative, supervisor or trustee in bankruptcy or any person entitled or bound to administer the affairs of the member concerned (4) **LATD, §1.16**: the Underwriting Member of Lloyd’s (which Member may be a natural person with unlimited liability or a legal person with limited liability) who or which is a party to the Lloyd’s American Trust Deed in respect of his or its American business and underwrites through the agency of the Agent [*see Closed Year Names; Names; Reinsured Names*]

Name’s Premium — **RRC 4, Sch. 2, §1**: in respect of any Name, has the meaning ascribed thereto in clause 5.1(b) of this Agreement

Name’s RP Share — **RRC 4, Sch. 5, §2**: in respect of any Name, the proportion of the Annual Adjustment payable to that Name in any year calculated in accordance with the formula:

$$\frac{(X + Y) - Z}{((A+B) - C) - D}$$

Where: X = the aggregate amount payable by the Name pursuant to clause 5.1(b) of this Agreement; Y = the aggregate amount held as at the Effective Date in the Segregated Accounts in respect of all Syndicates of which the Name was a member and which were attributable to the business of that Name less the aggregate of Assumed Liabilities in respect of that Name, and plus or minus any amount payable to or by ERL (as the case may be) by way of adjustment in respect of that Name pursuant to the Completion Accounts and Co-operation Agreement; Z = the amount of Debt Credits (if any) applied by Lloyd’s for the benefit of the Name under clause 3.1 of the Settlement Agreement against his Name’s Premium; A = the aggregate of (i) the total amounts payable by all Names pursuant to clause 5.1(b) of this Agreement; (ii) the amount payable by Centrewrite Limited as consideration for the reinsurance provided by ERL to Centrewrite Limited pursuant to the Centrewrite Reinsurance; and (iii) if the Lioncover Reinsurance is entered into by ERL and becomes unconditional, the amount payable by Lioncover by way of consideration for reinsurance under the Lioncover Reinsurance; B = the aggregate amount (less the aggregate of all Assumed Liabilities) transferred to or for the account of ERL or to or for the account of the trustees of the EATF or the ECTF pursuant to clause 5.1(a) of this Agreement and plus or minus any amount payable to or by ERL (as the case may be) by way of adjustment to the Completion Accounts pursuant to the Completion Accounts and Co-operation Agreement; C = the aggregate amount of Debt Credits applied by Lloyd’s for the benefit of all Names under clause 3.1 of the Settlement Agreement against their Names’ Premiums; and D = the aggregate of the amounts calculated by reference to X, Y and Z above in respect of all Names (if any) who have waived their entitlements to premium adjustment

Names — (1) **RRC 4, parties**: the underwriting members of Lloyd’s comprising the syndicates specified in schedule 1 as constituted for the years of account specified in schedule 1 (the Syndicates and each a Syndicate) in their capacity as members of one or more of the Syndicates (2) **RRC 4, Sch. 2, §1**: in respect of each Syndicate, the members of Lloyd’s as set out in the relevant Syndicate List acting in

their capacity as members of the Syndicate (3) **RRC 7, §1.1**: the members of a Syndicate for the underwriting year as set out in the Syndicate List acting in their capacity as members of such Syndicate (4) **RRC 17, §1.1**: the underwriting members of the Society of Lloyd's who are at any time bound by the terms of the Reinsurance Contract or under any contract with Equitas Reinsurance Limited on substantially the same terms and any person to whom the benefit of the Reinsurance Contract (or any contract with Equitas Reinsurance Limited on substantially the same terms) shall pass on the death of any such Name [*see Closed Year Names; Name; Reinsured Names*]

Names Debts — **RRC 4, Sch. 2, §1**: in relation to a Segregated Account, those amounts payable by Names in respect of losses declared to 31 December 1994 but uncalled as at 15 March 1996, deferred losses owing as at 15 March 1996 and called but unpaid losses as at 1996, together, where relevant with interest thereon as taken into account in the calculation of Name's Premiums relating to Syndicate 1992 and Prior Business

Net Capital Gain — **LATD, §1.17**: the excess in each calendar year of realized and unrealized capital gains over realized and unrealized capital losses calculated annually as of December 31

Non Dedicated Available Assets — (1) **RRC 4, Sch. 2, §1**: the Available Assets of ERL less the aggregate of (i) the Dedicated Assets (but adding back so much of the Dedicated Assets as ERL determines are available to it to meet Original Liabilities in respect of Residual Business, because of a surplus of assets in the relevant trust fund, or otherwise, as the case may be) and (ii) so much of the Available Assets of ERL as ERL determines are required to discharge those specific liabilities identified in clause 6.17 (2) **RRC 5, Sch. 3, §17**: the Available Assets of Equitas less the aggregate of (i) the Dedicated Assets (but adding back so much of the Dedicated Assets as Equitas determines are available to it to meet Original Liabilities in respect of Residual Business, because of a surplus of assets in the relevant trust fund, or otherwise, as the case may be), and (ii) so much of the Available Assets of Equitas as Equitas determines are required to discharge the specific liabilities identified in clause 3.3 [*see Relevant Available Assets*]

Non-Domiciliary Commissioner — **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.14**: the Chief Regulatory Officer for Insurance other than the Domiciliary Commissioner in any state, territory, district, commonwealth or possession of the United States in which the Underwriters have Policyholders and who has provided the Trustee with written notice that he or she requires any notification required to be made to the Domiciliary Commissioner pursuant to this Deed of Trust

Notice of Intention — **EATD, §13(a)**: written notice [from the Grantor or the Beneficiary to the Trustee] of its intention to terminate the Trust Fund

Notice of Requirements — **RRC 4, Sch. 2, §1**: the notice of requirements issued to ERL or Equitas (as the context may require) by the Secretary of State on 29 March 1996, in each case as amended from time to time [*see DTI*]

Notices of Requirements — **RRC 1, Sch. 1, §1**: the notices of requirements issued to Equitas and Equitas Limited by the Secretary of State on 29 March 1996 as replaced by revised notices of requirement which expire on 29 March 2006 [*see DTI*]

O

Obligations — **EATD, §1**: with respect to the American Business of the Names reinsured under the Reinsurance Agreement and retroceded under the Retrocession Agreement: (a) losses and allocated loss expenses paid or currently required be paid by the Name, but not recovered from the Grantor; (b) reserves for losses which are owed by the Name and which have been reported and are outstanding; (c) reserves for losses which are owed by the Name and which have been incurred, but not reported; (d) reserves for allocated loss expenses; (e) reserves for unearned premiums; and (f) any other amounts constituting part of the Reinsurance Obligation or Retrocession Obligation the Grantor in respect of American Business. The Grantor shall determine the amount of any Obligations, when required in accordance with Section 4(a) (viii) and Section 13 hereof, in accordance with the accounting principles applied for solvency purposes by the Department of Trade and Industry or its successor as the primary U.K. regulator of the Grantor for solvency matters

Original Liability — (1) **RRC 4, Sch. 2, §1**: the net present value, discounted at the prevailing discount rate, of the amount of the unsatisfied liability (actual, prospective or contingent) which ERL would have had to Reinsured Parties at the Record Date in respect of the Reinsurance Indemnities if no Proportionate Cover Plan had ever been implemented but leaving out of account all or part of any liability in respect of which a dedicated asset is available as referred to in sub-paragraph (ii) in the definition of Non-Dedicated Available Assets (2) **RRC 5, Sch. 3, §17**: the net present value, discounted at the prevailing discount rate, of the amount of the unsatisfied liability (actual, prospective or contingent) which Equitas would have had to ERL at the Record Date in respect of the Retrocession Indemnities if no Retrocession Plan had ever been implemented, but leaving out of account all or part or any liability in respect of which a dedicated asset is available as referred to in sub-paragraph (ii) of the definition of Non-Dedicated Available Assets

Original Trustees — **RRC 17, parties**: Sir Adam Ridley of 41 Tower Hill, London EC3N 4HA; Viscount Bledisloe QC of Fountain Court Chambers, Temple, London EC4Y 9DH; Michael Deeny of 60 Bedwin Street, Salisbury, Wiltshire SP1 3UW; Desmond Heyward of Haseley Court, Little Haseley, Oxfordshire OX44 7LL; John Mays of 20 Beachcroft, Gallsworthy Road, Kingston-upon-Thames KT2 7BL; Colin Murray of The Long House, Hurstbourne Priors, Whitchurch, Hampshire RG28 7SB; and Richard Spooner of Creffield House, 2a Oxford Road, Colchester, Essex CO3 3HN

Other Names — **LATD, §1.18**: the Underwriting members of Lloyd's (other than the Name) and such former Underwriting Member of Lloyd's as continue to have underwriting business at Lloyd's, not fully wound up and the personal representatives or trustee in bankruptcy of any such Underwriting Member or former Underwriting Member who has died or become bankrupt

Other Returns — (1) **RRC 4, Sch. 2, §1**: in respect of any Syndicate or Closed Year Syndicate, all rights (howsoever arising) in respect of income receivable (other than in respect of the relevant Syndicate Reinsurances), including premiums, return premiums, salvages, claim refunds and any other moneys which may be applied in reducing the amount of any liability comprised in the Syndicate 1992 and Prior Business of that Syndicate or Closed Year Syndicate but excluding any Segregated Amount Receivable (2) **EATD, §1**: in respect of any Syndicate, all rights (howsoever arising) in respect of income receivable (other than in respect of Syndicate Reinsurances), including premiums, return premiums, salvages, claim refunds and any moneys which may be applied in reducing the amount of any liability comprised in 1992 and Prior Business

Other Right — **RRC 1, Sch. 1, §1**: a Claim by an Accepting Name (whether directly, or by or through an Action Group for his benefit, on his behalf or otherwise) arising out of, or in any way related to or connected with, whether directly or indirectly, the Reconstruction and Renewal Proposals including, but not limited to: (a) the making of the Reconstruction and Renewal Byelaw, any resolutions passed or action taken pursuant thereto and any other regulatory and related actions in relation to the implementation of the Reconstruction and Renewal Proposals; (b) the reserving exercise in relation to 1992 and Prior Business, including the work of the Reserve Groups and their advisers and the determination of the Equitas Premium in the context of the Equitas Scheme; (c) the allocation of the Combined Litigation Settlement Funds or Debt Credits, including the work of the Names Committee and the Settlement Allocation Advisory Committee; (d) the work of the Validation Steering Group and the Settlement Agreement Review Group; (e) the preparation and publication of the Settlement Information Document, the Settlement Offer Document, the Finality Statements and the Settlement Agreement; and (f) the State Agreement, including the allocation and reallocation of the State Credits and the work of the Neutral Evaluator; except that a Claim for this purpose shall not include: (g) a Claim against any person in respect of any obligations expressly assumed by him under this Settlement Agreement; and (h) a Claim under the Reinsurance Contract or any of the Equitas Documents

Overseas Deposit Deed — **RRC 4, Sch. 2, §1**: any trust deed, security or custody agreement or other agreement required to be established by ERL and/or Equitas by any regulatory authority in any jurisdiction other than Canada, the United Kingdom or the United States of America (excluding for the State of Illinois) for the purpose of protecting the rights of Insurance Creditors

Overseas Deposit Fund — **RRC 4, Sch. 2, §1**: any deposit from time to time held in respect of a Name or Names under the terms of any Overseas Deposit Deed

P

Parent — EATD, §1: with respect to any person other than an individual, a person that, directly or indirectly, controls such person

Participant — RRC 1, Sch. 1, §1: any of the Parties (other than an Accepting Name) and any Additional Person, Auditor Person, Broker Person, Citibank Person, Equitas Person, Lloyd's Person, Royal Trust Person, Substitute Agent Person and Underwriting Agent Person

Party — RRC 1, Sch. 1, §1: a party to this Settlement Agreement who is listed or referred to at the head of this Settlement Agreement

person — EATD, §1: an individual, firm, association, corporation, limited liability company, partnership, limited liability partnership, trust, unincorporated organization or a government or political subdivision thereof, or any other legal, business or governmental entity

personal reserve fund — RRC 4, Sch. 2, §1: that part of the trust fund held under a Premiums Trust Deed or the Lloyd's American Trust Deed under the control or direction of a Members' Agent

personal stop loss or **PSL** — RRC 4, Sch. 2, §1: has the meaning given in the Personal Stop Loss Reinsurance Regulation (No. 2 of 1990)

Policyholder — (1) EATD, §1: any policyholder whom a Name is liable in respect of American Business (2) LATD, §1.19: any policyholder to whom the Name is liable in respect of the American business (3) Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.15: for the purposes of this Trust Deed, the holder of an American Policy resident or doing business in the United States, and any other persons or associations who are assignees, pledgees, or mortgagees named therein

Premiums Trust Deed — (1) RRC 4, Sch. 2, §1: a trust deed (as amended from time to time in accordance with its terms) the parties to which include a Name and Lloyd's in one of the relevant forms for general business approved for the time being by the Council and (under section 83 of the Insurance Companies Act 1982) the Secretary of State (2) LATD, §1.20: the Lloyd's Premiums Trust Deed approved pursuant to the Insurance Companies Act (U.K.) 1982 or a later similar statute, executed by the Name in respect of insurance business at Lloyd's other than long term business

Premiums Trust Fund — (1) RRC 4, Sch. 2, §1: the fund of premiums and other moneys and assets from time to time held by or under the control of the Substitute Agent upon the terms of a Premiums Trust Deed (2) LATD, §1.21: the property held in trust subject to the provisions of the Name's Premiums Trust Deed

Proceedings — RRC 1, Sch. 1, §1: any legal, arbitral, administrative, regulatory or other action or proceeding (including to enforce, or any appeal from, any judgment, award or order) of any nature whatsoever

Proportionate Cover Declaration — RRC 4, Sch. 2, §1: a notice or advertisement issued by ERL stating that a Proportionate Cover Plan has been implemented or adjusted and stating: the effective date of coming into effect of the Proportionate Cover Plan or, as the case may be, the effective date of the adjustment to such Proportionate Cover Plan; the Proportionate Cover Rate or Rates; and whether any Reinsured Names may be entitled to payments under paragraph 13 of schedule 3 [see **Interim Proportionate Cover Declaration**; **Interim Retrocession Declaration**; **Retrocession Declaration**]

Proportionate Cover Plan — (1) RRC 4, Sch. 2, §1: an adjustment of the liabilities of ERL in respect of the Reinsurance Indemnities to Reinsured Names in accordance with [RRC 4] clause 3.5 and schedule 3 (2) RRC 7, §1.1: a plan of such name introduced pursuant to clause 3.5 and schedule 3 to the Reinsurance Contract [RRC 4]

Proportionate Cover Rate — RRC 4, Sch. 2, §1: the percentage rate by which the Original Liabilities, or a relevant part of them, must be multiplied in order for ERL to be able to discharge the Original Liabilities from the Available Assets, and as the same may be calculated separately for American Business, Canadian Business, Australian Business and Residual Business (where applicable) in accordance with paragraph 6.1 of schedule 3

PSL Companies Reinsurance — (1) RRC 4, Sch. 2, §1: the contract of insurance between ERL and certain company underwriters in respect of personal stop loss liabilities in respect of 1992 and Prior Business

under various policies as set out therein (2) **RRC 5, recital (A)**: ERL has entered into reinsurance contracts under which it has agreed to reinsure and indemnify ... the PSL Companies in respect of certain personal stop loss liabilities

PSL Companies — **RRC 5, Sch. 1, §1**: shall have the meaning ascribed thereto in the PSL Companies Reinsurance

PSL Underwriters — **RRC 1, Sch. 1, §1**: the Syndicates and companies which execute PSL Administration Agreements or on whose behalf such Agreements are executed, but only in their capacity as insurers of PSL Contracts

Q

Qualifying Reinsurer — (1) **EATD, §1**: an insurance company designated by the Council for the purpose of providing Reinsurance to Close (2) **LATD, §1.22**: an insurance company designated by the Council for the purpose of providing Reinsurance to Close

R

Readily Marketable Securities — **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.6**: securities readily marketable on regulated United States national or principal regional security exchanges or those determined by the Securities Valuation Office of the NAIC to have substantially equivalent liquidity characteristics

Receiver — **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1. 10**: for purposes of this Trust Deed, the Domiciliary Commissioner or such other person as may be designated by statute or ordered by a court of competent jurisdiction

Reconstruction and Renewal Byelaw — (1) **RRC 1, Sch. 1, §1**: the Reconstruction and Renewal Byelaw (No. 22 of 1995) (2) **RRC 4, Sch. 2, §1**: the Reconstruction and Renewal Byelaw (No. 22 of 1995)

Reconstruction and Renewal Proposals — **RRC 1, Sch. 1, §1**: the proposals originally described in the document entitled "Lloyd's: reconstruction and renewal" issued by the Council in May 1995, as from time to time varied or supplemented by, inter alia, the Settlement Information Document and the Settlement Offer Document, and the implementation of the proposals inter alia, through the Settlement Offer and the Equitas Scheme [see **Equitas Scheme**]

Record Date — (1) **RRC 4, Sch. 2, §1**: the date on which a valuation of Available Assets, Original Liabilities and General Creditors takes place for the purposes of paragraph 5.1 of schedule 3 (2) **RRC 5, Sch. 3, §17**: the date on which a valuation of Available Assets and Original Liabilities takes place for the purposes of paragraph 5.1

Regulating Trustee — **LATD, §1.23**: the Trustee for the time being designated as the Name's Regulating Trustee pursuant to any of the Name's Premiums Trust Deeds

Reinsurance Contract — (1) **Equitas Holdings Articles**: the Reinsurance and Run-Off Contract dated 3 September 1996 between Equitas Reinsurance Limited, certain underwriting members of Lloyd's, Lloyd's, Equitas Limited and others as amended by the Reinsurance and Run-Off Contract Amendment Agreement dated 17 December 1997 and as may be further amended from time to time (2) **RRC 7, §1.1**: the contract dated on or about the date hereof entered into between inter alia ERL, the Names, the Closed Year Names, the Substitute Agent, Lloyd's, Equitas Limited and the Trustee pursuant to which ERL agrees to reinsure and indemnify the Syndicates in relation to the Syndicate 1992 and Prior Business of each Syndicate (3) **RRC 17, §1.1**: the Reinsurance and Run-off Administration Contract to be dated on or about 2 September 1996 and made between Equitas Reinsurance Limited and others [see **Reinsurance Contracts**; **Reinsurance Indemnities**; **Reinsurance Obligation**]

Reinsurance Contracts — **RRC 5, Sch. 1, §1**: the Initial Reinsurance Contracts and the Additional Reinsurance Contracts [see **Reinsurance Contract**; **Reinsurance Indemnities**; **Reinsurance Obligation**]

Reinsurance Indemnities — **RRC 4, Sch. 2, §1**: the indemnity contained in clause 3 of this Agreement and the indemnities contained in any other contract of reinsurance underwritten by Equitas other than, for the purposes of schedule 3 only, the Illinois Collateral Reinsurance [see **Reinsurance Contract**; **Reinsurance Contracts**; **Reinsurance Obligation**]

Reinsurance Obligation — (1) **RRC 4, Sch. 2, §1**: the obligation of ERL to reinsure the 1992 and Prior Business subject to and in accordance with clause 3 (2) **EATD, §1**: the meaning set forth in the first recital hereto (3) **LATD, §1.24**: the obligations of ERL and any successor thereto to the Name under the Equitas Reinsurance Agreement [*see* **Reinsurance Contract**; **Reinsurance Contracts**; **Reinsurance Indemnities**]

reinsurance — **RRC 4, Sch. 2, §1**: includes, except where the context requires, retrocession

Reinsurance to Close — (1) **EATD, §1**: (a) in relation to any Year of Account of a Syndicate, including without limitation, the 1993, 1994 or 1995 Year of Account, a reinsurance agreement under which members of a Syndicate for a Year of Account agree with the members of the same or another Syndicate for a later Year of Account or a Qualifying Reinsurer that the reinsuring members, or the Qualifying Reinsurer, as the case may be, will indemnify the members to be reinsured, without limit, against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through the Syndicate and allocated to the closed Year of Account; or (b) in relation to the 1993 or 1994 Year of Account of a Syndicate, a reinsurance agreement whereby any Qualifying Reinsurer agrees to indemnify without limit the members of that Syndicate for that Year of Account against all 1992 and Prior Business reinsured to close into that Year of Account, taken together with an unlimited reinsurance agreement whereby the members of the same or another Syndicate for a later Year of Account or a Qualifying Reinsurer agree to reinsure all liabilities of the reinsured members arising out of insurance business underwritten through that Syndicate and allocated to the closed Year of Account other than 1992 and Prior Business; and for purposes of this definition only, the Reinsurance Obligation shall be deemed to be without limit (2) **LATD, §1.25**: (A) in relation to any Year of Account of a Syndicate, including without limitation the 1993 or 1994 Year of Account, a reinsurance agreement under which members of a Syndicate for a Year of Account agree with the members of the same or another Syndicate for a later Year of Account or a Qualifying Reinsurer that the reinsuring members, or the Qualifying Reinsurer, as the case may be, will indemnify the members to be reinsured, without limit, against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through the Syndicate and allocated to the closed Year of Account; or (B) in relation to the 1993 or 1994 Year of Account of a syndicate, a reinsurance agreement whereby any Qualifying Reinsurer agrees to indemnify without limit the members of that Syndicate for that Year of Account against all 1992 and Prior Business reinsured to close into that Year of Account, taken together with an unlimited reinsurance agreement whereby the members of the same or another Syndicate for a later Year of Account or a Qualifying Reinsurer agree to reinsure all liabilities of the reinsured members arising out of insurance business underwritten through that Syndicate and allocated to the closed Year of Account other than 1992 and Prior Business; and for the purposes of this definition only, the Reinsurance Obligation shall be deemed to be without limit

reinsurance to close — **RRC 4, Sch. 2, §1**: has the meaning given to it in the Syndicate Accounting Byelaw (No. 18 of 1994) and reinsured to close and similar terms shall be construed accordingly

Reinsurance Trigger Event — **RRC 4, Sch. 2, §1**: a Certified Reinsurance Trigger Event or an Automatic Reinsurance Trigger Event as the case may be

Reinsured Names — **RRC 7, §1.1**: the Names and the Closed Year Names [*see* **Name**; **Reinsured Parties**]

Reinsured Parties — (1) **RRC 4, Sch. 2, §1**: the Names, the Closed Year Names, Centrewrite Limited, the E&O Companies, the PSL Companies and all other underwriting members of Lloyd's or other persons reinsured by ERL under the terms of any reinsured contract entered into by ERL in their respective capacities as persons entitled to the benefit of the Reinsurance Indemnities but not in any other capacity and includes any permitted assignee and any person deriving title from any such person or any permitted assignee of any such person (2) **RRC 5, Sch. 1, §1**: each of the Syndicates, the Closed Year Syndicates, Centrewrite, each of the E&O Companies, each of the PSL Companies and each reinsured under any Additional Reinsurance Contract

Relevant Available Assets — (1) **RRC 4, Sch. 2, §1**: so much of the Available Assets as are available to discharge liabilities applicable to American Business, Canadian Business, Australian Business and Residual Business, as the case may be (2) **RRC 5, Sch. 3, §17**: so much of the Available Assets as are available to discharge liabilities applicable to American Business, Canadian Business, Australian

Business and Residual Business, as the case may be [see **Dedicated Assets; Non Dedicated Available Assets**]

Relevant Original Liability — (1) **RRC 4, Sch. 2, §1**: so much of the Original Liability as relates to the Relevant Reinsurance Indemnities applicable to the American Business, Canadian Business, Australian Business and Residual Business, as the case may be (2) **RRC 5, Sch. 3, §17**: so much of the Original Liability as relates to the Relevant Retrocession Indemnities applicable to the American Business, Canadian Business, Australian Business and Residual Business, as the case may be

Relevant Reinsurance Indemnities — **RRC 4, Sch. 2, §1**: the portion of the Reinsurance Indemnities applicable to the American Business, Canadian Business, Australian Business and Residual Business, as the case may be

Relevant Retrocession Indemnities — **RRC 5, Sch. 3, §17**: the portion of the Retrocession Indemnity applicable to the American Business, Canadian Business, Australian Business and Residual Business, as the case may be

Relevant Retrocession Rate — **RRC 5, Sch. 1, §1**: has the meaning given in schedule 3

Relevant Rights — **RRC 4, Sch. 2, §1**: has the meaning set out in clause 6.6

Representative / Representative of the Agent — **LATD, §1.26**: one or more persons (without limitation as to number) designated by the Agent by one or more instruments in writing filed with the American Trustee as the Agent's Representative or Representatives with power, to the extent set forth in the relevant designation, to act in like manner and with the same effect as the Agent itself might act hereunder. The designation of any person as the Agent's Representative as hereinbefore provided shall remain effective for the period provided in the relevant designation or if no period is so provided such designation shall be effective until revoked by the Agent by an instrument in writing filed with the American Trustee

Requirements and Directions of the Council — **LATD, §1.27**: any requirements or directions of the Council (whether comprised in any byelaw, regulation, direction or any other written instrument issued by the Council to the Agent or other person concerned)

Reserve Group — **RRC 4, Sch. 2, §1**: any of the groups established in connection with the computation of reserves in connection with the Equitas Scheme for 1985 and prior years, 1986 to 1992 and 1992 and prior years pursuant to agency agreements entered into with Syndicates

Residual Business — **RRC 4, Sch. 2, §1**: the underwriting business of a Name other than his American Business, Canadian Business and Australian Business

Residual Business Rate — (1) **RRC 4, Sch. 2, §1**: the rate at which ERL can discharge its Relevant Original Liabilities in respect of Residual Business from its Non-Dedicated Available Assets (2) **RRC 5, Sch. 3, §17**: the rate at which Equitas can discharge its Relevant Original Liabilities in respect of Residual Business from its Non-Dedicated Available Assets

Retained Amount — **RRC 4, Sch. 5, §2**: the amount of such Available Surplus not distributed to Names as an Annual Adjustment in any year

Retained Profit — **RRC 5, Sch. 2, §1**: in respect of any Distributable Surplus, the amount of such Distributable Surplus not paid to ERL as profit participation

Retrocession Agreement — (1) **RRC 4, Sch. 2, §1**: the agreement of even date herewith between ERL and Equitas for the retrocession of, inter alia, 1992 and Prior Business and the delegation of the Run-off in the form set out in Appendix 2 (2) **RRC 17, §1.1**: the Retrocession Agreement to be dated on or about 2 September 1996 made between Equitas Reinsurance Limited and Equitas Limited

Retrocession Consideration — **RRC 5, Sch. 1, §1**: the consideration to be discharged under clause 3.1 by ERL in consideration for the Retrocession Obligation

Retrocession Declaration — **RRC 5, Sch. 3, §17**: a notice or advertisement issued by Equitas stating that a Retrocession Plan has been implemented or adjusted and stating: the effective date of coming into effect of the Retrocession Plan or, as the case may be, the effective date of the adjustment to such Retrocession Plan; the Retrocession Rate or Rates; whether ERL will be entitled to payments under paragraph 13 [see **Interim Proportionate Cover Declaration; Interim Retrocession Declaration; Proportionate Cover Declaration**]

Retrocession Indemnities — RRC 5, Sch. 3, §17: the indemnity to ERL contained in clause 2.3

Retrocession Obligation — (1) RRC 4, Sch. 2, §1: the obligation of Equitas to indemnify ERL pursuant to the Retrocession Agreement (2) RRC 5, Sch. 1, §1: the obligation of Equitas to reinsure ERL in accordance with clause 2 (3) EATD, §1: the meaning set forth in the second recital hereto

Retrocession Plan — (1) RRC 4, Sch. 2, §1: has the meaning set out in the Retrocession Agreement (2) RRC 5, Sch. 1, §1: has the meaning given in schedule 3 (3) RRC 5, Sch. 3, §17: an adjustment of the liabilities of Equitas in respect of the Retrocession Indemnities to ERL in accordance with clause 2.4. and this schedule

Retrocession Rate — (1) RRC 4, Sch. 2, §1: has the meaning set out in the Retrocession Agreement (2) RRC 5, Sch. 3, §17: the percentage rate by which the Original Liabilities, or a relevant part of them, must be multiplied in order for Equitas to be able to discharge the Original Liabilities from the Available Assets, and as the same may be calculated separately for American, Canadian, Australian and Residual Business (where applicable) in accordance with paragraph 6.1 of this schedule

Return on Surplus — RRC 4, Sch. 2, §1: in relation to a Name, return (whether income or capital) earned on assets comprised in any Surplus Account and allocable to that Name prior to the date on which those assets are transferred by the Substitute Agent to Equitas in payment (or part payment) of the Name's Premium of the Name or, if not so transferred, the date on which those assets are transferred by the Substitute Agent to a personal reserve fund of the Name

Run-off — RRC 4, Sch. 2, §1: the administration and run-off of the Syndicate 1992 and Prior Business of any Syndicate or any part thereof

Run-off Administration Agreement — RRC 4, Sch. 2, §1: any agreement entered into by Equitas with any third party for the provision of services to Equitas in relation to the administration of any Run-off

Run-off Date — RRC 4, Sch. 2, §1: the date hereof

S

Secretary of State — RRC 4, Sch. 2, §1: the Secretary of State for Trade and Industry or any other person exercising the relevant powers of the Secretary of State for Trade and Industry or the secretary of state having responsibility for such other governmental or other authority as from time to time carries out the functions in relation to insurance business carried on in the United Kingdom as are at the date of this Agreement carried out by the DTI

Secured Obligations — (1) RRC 4, Sch. 2, §1: all moneys and liabilities (including contingent liabilities) whatsoever which may be due, owing or payable by any Name or any Closed Year Name under any contract of insurance or reinsurance which has been reinsured by ERL under the terms of this Agreement (2) RRC 7, §1.1: all moneys and liabilities (including contingent liabilities) whatsoever which may be due, owing or payable by any Name or any Closed Year Name under any contract of insurance or reinsurance which has been reinsured by ERL under the terms of the Reinsurance Contract

Security Interest — RRC 4, Sch. 2, §1: any mortgage, charge, pledge, lien, right of possession or detention, right of set-off or any encumbrance or security interest whatsoever, howsoever created or arising or ranking in point of priority

Segregated Account — RRC 4, Sch. 2, §1: in respect of any Syndicate, the segregated account established pursuant to a Supervisory Management Agreement in respect of the Syndicate 1992 and Prior Business of that Syndicate or where, with the approval of ERL no Segregated Account was established, that part of such Syndicate's assets which relates to Syndicate 1992 and Prior Business of that Syndicate

Segregated Account Assets — RRC 4, Sch. 2, §1: (i) in relation to a Segregated Account those assets at the Effective Date which in accordance with the Supervisory Management Agreement and the Information and Administration Agreement are held in or treated as assets in or which ought to be held in or treated as assets in the Segregated Account, including cash, securities, bills, bonds, certificates of deposit, bills of exchange, Financial Reinsurances, Segregated Account Receivables, Syndicate Loans, book debts and all rights and claims in relation thereto, but excluding Names Debts, and (ii) where no Segregated Account has been established in relation to Syndicate 1992 and Prior Business, those as-

sets relating to Syndicate 1992 and Prior Business which have been designated as Segregated Account Assets by the Managing Agent with the concurrence of Equitas and/or ERL

Segregated Account Receivables — RRC 4, Sch. 2, §1: assets which, in relation to a Segregated Account, consist of a right of a Name or a Closed Year Name to receive money or other asset, whether that right is actual or contingent and whether or not, as at the date hereof, it is presently existing property or a mere expectancy excluding rights in respect of the proceeds of Syndicate Reinsurances, but including, without limitation, the rights of the Name or the Closed Year Name in respect of amounts receivable in relation to a Segregated Account, including payments due from Managing Agents or Lloyd's Central Accounting, premiums, premium returns (other than premium returns in respect of Financial Reinsurances) and salvages to the extent that the same are Segregated Account Assets, and the benefit of any mortgage, pledge, lien, assignment by way or security or any Security Interest whatsoever or any letter of credit or other form of credit support held in respect thereof

Segregated Account Return — RRC 4, Sch. 2, §1: the agreed Preliminary Balance Sheet and Equitas Segregated Account Return as at 31 December 1995 as defined in the Information and Administration Agreement and the paper entitled "Principles for Preparation" dated 12 February 1996 prepared in respect of each Syndicate

Settlement Agreement — (1) RRC 1, Sch. 1, §1: this agreement, as may be amended from time to time (2) RRC 4, Sch. 2, §1: the agreement entered into between, inter alia, Lloyd's, ERL and Accepting Names in the form set out in Appendix 1 to the Settlement Offer Document

Settlement Fund — (1) RRC 1, Sch. 1, §1: the sum of the Combined Litigation Settlement Funds and Debt Credits (2) RRC 4, Sch. 2, §1: the sum of the Combined Litigation Settlement Funds and the Debt Credits [see Auditor Settlement Fund; Litigation Settlement Fund]

Settlement Information Document — RRC 1, Sch. 1, §1: the document entitled "Reconstruction & Renewal: Settlement Information" dated 20 June 1996 which was sent to Names

Settlement Offer — (1) RRC 1, Sch. 1, §1: the offer, the terms of which are contained in the Settlement Offer Document, and any revision or amendment thereof (2) RRC 4, Sch. 2, §1: the offer, the terms of which are contained in the Settlement Offer Document, and any revision or amendment thereof

Settlement Offer Document — (1) RRC 1, Sch. 1, §1: the document to which this Settlement Agreement is appended by which Lloyd's made an offer to Names, inter alia, to settle the litigation in the Lloyd's market arising out of 1992 and Prior Business and any subsequent document by which the Settlement Offer is revised or amended (2) RRC 4, Sch. 2, §1: the document dated 30 July 1996 by which Lloyd's made an offer to Names, inter alia, to settle the litigation in the Lloyd's market arising out of 1992 and Prior Business [*in this work* "SOD"]

State Agreement — RRC 1, Sch. 1, §1: the agreement dated 11 July 1996 between Lloyd's and the securities regulators in certain states in the United States of America

State Credits — RRC 1, Sch. 1, §1: in respect of each Name, any amount offered to that Name pursuant to the State Agreement to be applied in the reduction of the amount to be paid by that Name pursuant to his Finality Statement

Structured Payment Plan — RRC 4, Sch. 2, §1: a collateralised, interest bearing plan which may be offered to a Name by ERL to allow for payment by instalments of part of his Name's Premium subject to the Name agreeing to pay interest on the deferred amount and to put in place a guarantee

Subscription Agreement — RRC 4, Sch. 2, §1: the agreement between ERL and Equitas under which ERL agrees to subscribe and Equitas agrees to issue to ERL, ordinary shares in Equitas

Subsidiary — EATD, §1: with respect to any person other than an individual, a person controlled, directly or indirectly, by such person

Subsidiary and Subsidiaries — RRC 17, §1.1: shall have the meaning ascribed thereto in Section 736 of the Companies Act 1985

Substitute Agent — (1) RRC 1, Sch. 1, §1: Additional Underwriting Agencies (No. 9) Limited, a limited company in England and Wales with company number 2666937 whose registered office is at One Lime Street, London EC3M 7HA, which the Council proposes to appoint to act as substitute managing agent of the syndicates to be reinsured by Equitas (2) RRC 4, parties: Additional Underwriting Agen-

cies (No. 9) Limited a limited company registered in England and Wales with company number 2666937 whose registered office is at Lloyd's of London, One Lime Street, London EC3M 7HA (3) **RRC 5, Sch. 1, §1**: the substitute agent appointed by the Council under the Substitute Agents Byelaw (No. 20 of 1983) as managing agent of each of the Syndicates and the Closed Year Syndicates (4) **RRC 7, §1.1**: in respect of the Reinsurance Contract, the person who has entered into such contract as substitute managing agent on behalf of the Syndicates, being the person appointed as substitute managing agent of such Syndicates pursuant to a direction of the Council under the Substitute Agents Byelaw (No. 20 of 1983) and any successor managing agency or substitute managing agent [*see Managing Agent*]

Substitute Agent's Appointment — **RRC 4, Sch. 2, §1**: the direction made by the Council under the Substitute Agents Byelaw (No. 20 of 1983) for the appointment of the Substitute Agent as substitute managing agent of each of the Syndicates and the Closed Year Syndicates as referred to in Recital (C)

Supervisory Management Agreement — **RRC 4, Sch. 2, §1**: each supervisory management agreement entered into between ERL, Lloyd's and a Managing Agent pursuant to a direction of the Council made on 18 December 1995

Surplus — **RRC 4, Sch. 2, §1**: in respect of any Syndicate, the amount, if any, of any surplus as shown as a release in the line entitled "shortfall/release" in the final reserve indication sent to that Syndicate in June 1996

Surplus Account — **RRC 4, Sch. 2, §1**: in relation to a Syndicate, assets standing to the credit of a Premiums Trust Fund, LATF or LCTF representing a surplus

syndicate — (1) **RRC 4, Sch. 2, §1**: a group of underwriting members of Lloyd's, to which a particular number is assigned by or under the authority of the Council, for whose account an active underwriter accepted or accepts insurance business at Lloyd's (2) **RRC 7, §1.1**: a group of underwriting members of Lloyd's, to which a particular number is assigned by or under the authority of the Council, for whose account an active underwriter accepted or accepts insurance business at Lloyd's [*see Syndicate*]

Syndicate — (1) **RRC 1, Sch. 1, §1**: a group of underwriting members of Lloyd's for whose account an active underwriter accepted or accepts insurance and/or reinsurance business at Lloyd's (2) **RRC 4, Sch. 2, §1**: each of the syndicate years of account listed in schedule 1 to this Agreement (3) **RRC 7, §1.1**: each of the syndicate years of account listed in schedule 1 to the Reinsurance Contract (4) **EATD, §1**: a group consisting of underwriting members of Lloyd's, to which a particular number is assigned by or under the authority of the Council, for whose account an underwriter accepted or accepts insurance or reinsurance business at Lloyd's (5) **Equitas Holdings Articles**: a group of underwriting members of Lloyd's for whose account an active underwriter accepted or accepts insurance and/or reinsurance business at Lloyd's (6) **LATD, §1.28**: a group consisting of Underwriting Members of Lloyd's, to which a particular number has been assigned by or under the authority of the Council, for whose account an underwriter accepts insurance or reinsurance business at Lloyd's [*see syndicate*]

Syndicate 1992 and Prior Business — **RRC 4, Sch. 2, §1**: in respect of any Syndicate or Closed Year Syndicate, all 1992 and Prior Business underwritten at Lloyd's by Names or Closed Year Names as members of the Syndicate or Closed Year Syndicate (including as reinsurers under any contract of reinsurance to close of any syndicate year of account reinsured to close either directly or indirectly by the Syndicate) and/or where the Syndicate is a 1993 or later year of account syndicate any liabilities under contracts of insurance relating to 1992 and Prior Business reinsured to close into the 1993 or any later year of account [*see 1992 and Prior Business; reinsurance to close; Name; Names; Reinsured Names; syndicate; Syndicate*]

Syndicate List — **RRC 4, Sch. 2, §1**: in respect of Syndicate and Closed Year Syndicate, (a) the last schedule prepared in respect of that Syndicate or Closed Year Syndicate specifying the Names who were members of that Syndicate or Closed Year Syndicate, the members syndicate premium limit of each such member of that Syndicate or Closed Year Syndicate, the basis and level of the managing agent's remuneration and containing such other particulars as may for the time being be required by the Council, and (b) for any purpose other than the calculation or allocation of consideration or rights under clause 8 of this Agreement, any other such schedule or document certified by Lloyd's and

showing any other member as having participated on that Syndicate or Closed Year Syndicate [*see syndicate; Syndicate*]

Syndicate Loan — RRC 4, Sch. 2, §1: the benefit of any loan made from funds held in a Premiums Trust Fund, LATF or LCTF in respect of 1992 and Prior Business attributable to a Segregated Account

Syndicate Premium — RRC 4, Sch. 2, §1: in respect of any Syndicate, any positive amount shown in the column headed Syndicate Premium in schedule 1 [*see syndicate*]

Syndicate Reinsurances — (1) RRC 4, Sch. 2, §1: in respect of any Syndicate or Closed Year Syndicate, those reinsurance contracts (excluding this Agreement and the reinsurance to close of any Closed Year Syndicate) taken out by the Syndicate or Closed Year Syndicate and those which enure to the benefit of the Syndicate taken out by any other syndicates or any Closed Year Syndicate reinsured to close, either directly or indirectly, by the Syndicate (or otherwise in respect of 1992 and Prior Business) but excluding any claim, right, title, benefit or interest under personal stop loss, estate protection reinsurance and individual run-off policies purchased on behalf of any Name for his own account (2) EATD, §1: in respect of any Syndicate, those reinsurance contracts (excluding the Reinsurance Agreement) taken out by the Syndicate, and those which enure to the benefit of the Syndicate taken out by any other Syndicate reinsured to close, either directly or indirectly, by the Syndicate (or otherwise in respect of 1992 Prior Business), but excluding any claim, right, title, benefit or interest under personal stop loss, estate protection reinsurance and individual run-off policies purchased on behalf of any Name for his own account [*see reinsurance; Reinsurance Contract; Reinsurance Contracts; Reinsurance Obligation; reinsurance to close; syndicate*]

T

Termination Date — *see Termination Notice*

Termination Notice — EATD, §13(b): written notification [from the Trustee] to the Beneficiary, the Grantor and the Superintendent of Insurance of the State of New York of the date (the “Termination Date”) on which the Trust Fund shall terminate

Terms and Conditions — RRC 4, Sch. 2, §1: the terms and conditions of the Settlement Offer as set out in Appendix 2 to the Settlement Offer Document, and any revision or amendment thereof

Third-Party Claimant — Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.19: one not a party to the insurance contract but having a final judgment or arbitration award against Underwriters for Claims or Loss covered by an American Policy

this Declaration of Trust — RRC 7, §1.1: this Declaration of Trust as amended or modified from time to time, including any other declaration, deed or instrument expressed to be supplemental hereto

To Transmit or Transmitted — Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §1.7: to send by telex, teletype, facsimile, modem or other similar means of electronic communication

Transferred Rights — RRC 4, Sch. 2, §1: has the meaning set out in paragraph 1.3(g) of schedule 4

Trigger Event — (1) RRC 4, Sch. 2, §1: has the meaning set out in the Retrocession Agreement (2) RRC 5, Sch. 1, §1: has the meaning given in paragraph 2 of schedule 3 [*see Automatic Reinsurance Trigger Event; Automatic Trigger Event; Certified Reinsurance Trigger Event; Certified Trigger Event*]

Trust — LATD, §1.14: the property held in trust hereunder

Trust Corporation — RRC 7, §1.1: a corporation entitled by rules made under the Public Trustee Act 1906 to act as a custodian trustee

Trust Deed — Equitas Holdings Articles: the trust deed to be entered into by the Trustees, the Company and Equitas Limited, as it may be amended from time to time

Trust Fund or Trust — (1) Lloyd’s US Surplus-Lines Common-Use Trust Deed, §1.21: the property in the actual and sole possession of the trustee and held under the provisions of this Trust Deed (2) Lloyd’s US Credit-for-Reinsurance Common-Use Trust Deed, §1.4: the cash, Readily Marketable Securities and Letters of Credit, or any combination thereof, in the actual and sole possession of the Trustee and held under the provisions of this Trust Deed

Trust Fund Minimum Amount — (1) Lloyd’s US Surplus-Lines Common-Use Trust Deed, §2.7: the mini-

minimum amount which Underwriters are required by law to maintain in the Trust Fund (2) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.7:** written notice of the minimum amount which Underwriters are required by law to maintain in the Trust Fund

Trust Period — **RRC 17, §1.1:** the period ending eighty years less one day from the date hereof or such earlier date as the Trustees (having regard to clause 2.3) shall by deed declare to be the end of the Trust Period (not being a date earlier than the date of such deed)

Trust Property — (1) **RRC 7, §1.1:** all the property, assets and rights (whether present, future, prospective or contingent) of Reinsured Names assigned to the Trustee pursuant to clause 4.1 of the Reinsurance Contract (2) **RRC 17, §1.1:** the sum of £10 referred to in Recital (B) and (once transferred in accordance with Recital (C)) the Ordinary Shares and also all property at any time added thereto by way of further settlement, accumulation of income, capital accretion or otherwise and all property from time to time representing the same respectively

Trust Term — **LATD, §1.29:** (A) If the Name is an individual, the period from the date of commencement of the underwriting business of the Name until such underwriting business shall have been wound up or until twenty-one years after the date of death of the Name, whichever shall first occur. (B) If the Name is a corporation, the period from the date of commencement of the underwriting business of the Name until such underwriting business shall have been wound up or until twenty-one years after the date of death of the survivor of the President and Vice President of the United States in office at the date of commencement of such underwriting business, whichever shall first occur. For the purposes of this definition, the Name's underwriting business shall not be considered to have been wound up by virtue of the Name being a party to a Reinsurance to Close agreement, including, without limitation, the Equitas Reinsurance Agreement

Trustee — (1) **RRC 4, parties:** Equitas Policyholders Trustee Limited a limited company registered in England and Wales with company number 3243970 whose registered office is at 20-22 Bedford Row, London WC1R 4JS (2) **RRC 7, parties:** Equitas Policyholders Trustee Limited of 20-22 Bedford Row, London WC1R 4JS (the Trustee, which expression shall include such company and any other person or persons acting as trustee for the time being of this Declaration of Trust) (3) **EATD, parties:** Citibank, N.A., a national banking association organized under the laws of the United States, as trustee hereunder (4) **Lloyd's US Surplus-Lines Common-Use Trust Deed, heading:** Citibank, N.A., a national banking association organized and existing under the laws of the United States of America, and having its principal offices at New York, New York (5) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, heading:** Citibank, N.A., a national banking association organized and existing under the laws of the United States of America, and having its principal offices at New York, New York (6) **Equitas Holdings Articles:** a trustee for the time being of the trust known as the Equitas Trust constituted by the Trust Deed

Trustee Priority Claims — (1) **Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.2:** all expenditures and fees under Paragraph 3.9 of this Trust Deed including legal fees and expenses actually incurred by or on behalf of the Trustee in connection with its administration, preservation or conservation of the Trust (2) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.2:** all expenditures and fees under Paragraph 3.9 of this Trust Deed including legal fees and expenses actually incurred by or on behalf of the Trustee in connection with its administration, preservation or conservation of the Trust

Trustees — **RRC 17, §1.1:** the Original Trustees and such other trustee or trustees as may be appointed in succession to any such person (or in succession to any other successor) as a Trustee of this Trust Deed in accordance with clause 9 of this Trust Deed [*in this work* "EquitasRe-reinsurance Trustees"]

U

Underwriters — **Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.22:** for purposes of this Trust Deed, underwriters at Lloyd's London and such former underwriters at Lloyd's London as continue to have underwriting business at Lloyd's not fully wound up and the personal representatives or trustee in bankruptcy of any such underwriter or former underwriter who has died or become bankrupt (2) **Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1. 12:** for purposes of this Trust Deed underwriters at Lloyd's London and such former underwriters at Lloyd's London as continue to have un-

derwriting business at Lloyd's not fully wound up and the personal representatives or trustee in bankruptcy of any such underwriter or former underwriter who has died or become bankrupt

Underwriting Agent — RRC 1, Sch. 1, §1: the companies and partnerships who execute deeds of adherence to the Underwriting Agents' Contribution Agreement but only in that capacity

Underwriting Agent Persons — RRC 1, Sch. 1, §1: any subsidiary or holding company (whether direct or indirect) of an Underwriting Agent, or any other subsidiary of any such holding company, from time to time, and the past and present directors, officers, partners, associates and employees of each of the Underwriting Agents or of any such companies (but only in that capacity), but shall not include Stephen Roy Merrett, any company excluded under the terms of the Underwriting Agents' Contribution Agreement or any company in respect of which, at the date on which the Settlement Offer is made: (a) an order has been made, a petition has been presented or a meeting has been convened for the purpose of considering a resolution for the winding up of the company or for the appointment of any provisional liquidator; (b) an administration order has been made or a petition has been presented for an administration order to be made in relation to the company; (c) a receiver or manager (including, without limitation, an administrative receiver) has been appointed or possession has otherwise been taken by or on behalf of the holders of any debentures secured by a floating charge, of all or any part of the company's property, assets or undertaking; or (d) a voluntary arrangement, proposed pursuant to Part I of the Insolvency Act 1986, has been approved or the company has entered into a compromise or other arrangement with all or some part of its creditors

Underwriting Agents' Contribution Agreement — RRC 1, Sch. 1, §1: the agreement entered into, or to be entered into, between Underwriting Agents, Lloyd's and Equitas in connection with the Settlement Offer

Unearned Premium — Lloyd's US Surplus-Lines Common-Use Trust Deed, §1.3: a claim against one or more Underwriters by a Policyholder for the return of unearned premium under an American Policy

US Representative — Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §1.9: the individual or firm registered with the Trustee as the Underwriters' U.S. attorney or representative

US Trust Assets — (1) RRC 4, Sch. 2, §1: the aggregate of the assets in the EATF and such amounts, if any, as are held in the LATF and are available only for the discharge of 1992 and Prior Business (excluding, for the avoidance of doubt, the Illinois Trust Fund) (2) RRC 5, Sch. 3, §17: the aggregate of the assets in the EATF and such amounts, if any, as are held in the LATF and are available only for the discharge of 1992 and Prior Business (excluding, for the avoidance of doubt, the Illinois Trust Fund)

US Trust Rate — (1) RRC 4, Sch. 2, §1: the rate at which liabilities applicable to American Business (excluding for this purpose Illinois Retained Business) may be discharged from US Trust Assets alone (2) RRC 5, Sch. 3, §17: the rate at which liabilities applicable to American Business (excluding for this purpose, Illinois Retained Business) may be discharged from US Trust Assets alone

US\$ or US Dollars — RRC 4, Sch. 2, §1: the lawful currency of the United States of America

W

Waiting Period — Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.3: the 12-month period ... commencing on the date the Trustee receives written notice that the Lloyd's market has ceased trading as set forth in Paragraph 4.1 (a) or the date the Trustee is required to transmit a notice to the Agent pursuant to Paragraph 4.1(b)

Withdrawal Notice — EATD, §3(a): written notice to the Trustee and the Grantor LATD, §1.30: a Notice of Withdrawal of assets from the Equitas Trust Fund given in accordance with the Equitas Trust Agreement

Y

Year of Account — (1) EATD, §1: a year which is accounted for as a separate underwriting venture by a Syndicate under Lloyd's system of accounts (2) LATD, §1.31: a year which is accounted for as a separate underwriting venture by a Syndicate under Lloyd's system of accounts

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